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IN THE

Supreme Court of the United States

October Term, 1953

No. [redacted] 79

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE, and BERNARD V. PROVENZANO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

October Term, 1953

No.....

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE, and BERNARD V. PROVENZANO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Las Vegas Merchant Plumbers Association, Merchant Plumbers Exchange, Inc., A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie, and Bernard V. Provenzano, pray that a writ of certiorari issue to review

a judgment of the United States Court of Appeals for the Ninth Circuit, rendered on February 1, 1954. On February 26, 1954, petitioners moved the Court of Appeals for a rehearing of this matter but the said motion for rehearing was denied on March 22, 1954. On motion of petitioners an extension of thirty days to May 21, 1954, was granted in which to file this petition to this Court.

Petitioners were indicted under Section 1 of the Sherman Antitrust Act (15 U. S. C. A., Sec. 1) which reads as follows:

> "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

Petitioners were found guilty by a jury verdict and on November 8, 1951, received sentences as follows:

Las Vegas Merchant Plumbers Association,	fined $5,000.00;
Merchant Plumbers Exchange, Inc.,	fined $5,000.00;
A. R. Ruppert Plumbing & Heating Company,	fined $1,000.00;
United Plumbing and Heating Company,	fined $1,000.00;
A. R. Ruppert, six months confinement;	fined $4,000.00 and
Joe Davis,	fined $2,000.00;
Ruben Cohen,	fined $2,000.00;
Jack Hynds,	fined $3,000.00;
Don McGarvie,	fined $2,000.00;
Bernard V. Provenzano six months confinement.	fined $5,000.00 and

Reference to Official Report of Opinion Below.

Petitioners perfected an appeal to the United States Court of Appeals for the Ninth Circuit. Thereafter the said Court of Appeals affirmed the Trial Court's judgment, the opinion of the Court of Appeals being reported in 210 F. 2d 732 and Vol. V of Record, pages 1502-1541, inclusive.

This petition is directed to said judgment of affirmance.

Statement as to Jurisdiction.

The conviction was affirmed by judgment of the Court of Appeals on February 1, 1954. Rehearing was denied on March 22, 1954. The jurisdiction of this Court is based on the Act of June 25, 1948, c. 646 (62 Stats. 928) U. S. C., Title 28, Section 1254, subsection 1.

Applicable herein is Section 1 of the Sherman Anti-trust Act (15 U. S. C. A., Sec. 1).

Questions Presented for Review.

1. Did the Trial Court in its instructions commit prejudicial error by failing to instruct the jury that a finding that the commodities in question were "in interstate commerce" required a finding that plumbing and heating supplies moved in a "continuous and uninterrupted" stream from out-of-state sources to their places of installation and use within the state, as charged in the indictment?

2. Did the Trial Court in its instructions commit prejudicial error by refusing to submit to the jury for its consideration on the issue of the movement of plumbing and heating supplies in interstate commerce the fact of

the interruption in the interstate flow of plumbing and heating supplies by delivery to wholesalers and plumbing contractors as stock and inventory items?

3. Did the Trial Court in its instructions commit prejudicial error by refusing to submit to the jury for its consideration on the issue of the movement of plumbing and heating supplies in interstate commerce the fact that petitioners as plumbing contractors were not in the business of selling individual items of plumbing and heating supplies, but rather sold and dealt in completed and installed plumbing and heating systems and appliances which required fabrication and treatment together with the addition of skilled labor for the completed result?

4. Did the Trial Court in its instructions commit prejudicial error by refusing to charge the jury that Federal jurisdiction under the Sherman Act requires proof that the activities complained of bear some direct rather than remote and indirect relationship to goods in the flow of interstate commerce?

5. Did the Trial Court in its instructions commit prejudicial error by refusing to charge the jury that Federal jurisdiction under the Sherman Act requires proof that the activities complained of have in intent, purpose or necessary result some substantial effect upon the flow of goods in interstate commerce?

6. As a matter of law, does a finding of a conspiracy to fix prices on goods "in interstate commerce" constitute a *"per se"* violation of Section 1 of the Sherman Act without a finding that:

(a) The conspiracy in intent, purpose of necessary result affected the flow of interstate commerce, and/or that

(b) The conspiracy had some direct connection—as opposed to an indirect or remote one—to a burdening of the flow of goods in interstate commerce, and/or that

(c) The conspiracy had *some* burdensome effect upon the flow of goods in interstate commerce.

7. Did the Trial Judge commit prejudicial error by failing to leave to the jury the question of whether the facts proved showed that the alleged conspiracy was in purpose or effect a sufficiently direct and substantial burden upon the flow of goods in interstate commerce so as to constitute a violation of the Sherman Act, or is this conclusion solely a matter of law?

8. Did the Trial Judge commit prejudicial error in refusing to instruct the jury in any single particular with respect either to petitioners' theory of the case or with respect to the converse of any of the instructions given?

9. Does the evidence substantiate the allegations in the indictment with respect to the existence of an interstate flow of commodities including these elements:

(a) That the goods in question flowed in a continuous and uninterrupted stream from out-of-state sources to their places of installation and use within the State of Nevada.

(b) That substantial quantities of goods were shipped directly from out-of-state sources to the job site.

(c) That substantial quantities of goods were shipped from out-of-state sources to wholesalers in response to specific orders from plumbing contractors.

(d) That substantial quantities of goods were shipped from out-of-state sources to plumbing contractors which were earmarked for specific jobs.

10. Does the evidence substantiate the allegations in the indictment that a conspiracy in fact existed in intent, purpose or necessary result to fix prices upon goods in interstate commerce constituting a violation of the Sherman Act?

11. Was the United States Attorney guilty of prejudicial misconduct by referring in his closing remarks to the jury to the nature of the punishment for the offense for which petitioners were on trial.

12. Did the Trial Court commit reversible error by its hostile treatment of petitioners' counsel, by its rulings prejudicially in favor of the government, and by its interference with the full presentation of petitioners' defense?

Statement of the Case.

Petitioners A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie and Bernard V. Provenzano, are individual companies and individuals, licensed as plumbing and heating contractors in the State of Nevada.

Petitioners Las Vegas Merchant Plumbers Association, and Merchant Plumbers Exchange, Inc., are organizations of plumbing and heating contractors located in the State of Nevada. None of petitioners have any offices or transact business outside of the State of Nevada.

Petitioners were indicted under the Sherman Act, charging a violation of that Act by means of a conspiracy to

suppress and eliminate competition in plumbing and heating supplies. The indictment alleged, for purposes of Federal jurisdiction, that substantial quantities of plumbing and heating supplies were purchased from out-of-state sources and shipped into Nevada; that such supplies were either shipped directly to plumbing contractors in Nevada, or to wholesalers of plumbing and heating supplies who purchase their materials in response to prior orders placed with them by plumbing contractors, and to whom said supplies are immediately delivered when they are received; that substantial quantities of plumbing and heating supplies are shipped from out-of-state sources directly to the job site where they are installed by plumbing contractors in Nevada; and that petitioners are conduits through which plumbing and heating supplies manufactured in other states move in a continuous and uninterrupted stream to their places of installation within Nevada.

The indictment further charges petitioners together with defendant, Ralph Alsup, of having conspired to establish an organization which would retain a common estimator who would fix prices for use by plumbing contractors; that the price as determined by the common estimator would then be submitted by the particular plumbing contractor to whom the job had been "allocated" by a so-called Allocation Committee which was set up by appellants; that thereafter plumbing contractors, other than the person to whom the job had been so "allocated," would submit higher bids in ostensible competition, and that compliance with this scheme was to be maintained by defendant Ralph Alsup, who would use his position as business agent of the union having jurisdiction over plumbers

to induce qualified workmen not to work on any job other than the one which had been "allocated," as aforesaid.

The indictment then charged that the purpose, intent and necessary effect of this combination was to directly, unreasonably, arbitrarily and unlawfully restrain and obstruct the flow of plumbing and heating supplies in interstate commerce into Southern Nevada.

The testimony produced by the Government to sustain the charge of a conspiracy consisted of several persons who, had such conspiracy existed, were admittedly unindicted co-conspirators. None of these witnesses were able to testify from their own knowledge and observation that the so-called "allocation committee" was ever established; the evidence adduced was to the effect that such a committee was supposed to have been or was "understood to have been" established. [Tr. pp. 560, 823, 939.]

With respect to the issue of adhering to the prices set by a common estimator employed by the Association, each of the Government witnesses testifying as to this issue admitted that there was no compulsion to adhere to such prices and, on the contrary, that the general practice was to submit bids other than those suggested by the common estimator. [Tr. pp. 577, 680, 816, 957-958.]

With respect to the method of enforcing the so-called conspiracy by withholding qualified labor from the plumbing contractor who did not adhere to the alleged conspiracy, all but one of the government witnesses testified that he had never experienced any difficulty in obtaining qualified labor even though he did not adhere to the price suggested by the common estimator. The sole government witness testifying in support of this issue recounted a solitary instance, and grave doubt was cast upon his inter-

pretation and veracity because the facts as related by this witness lent themselves equally well to petitioners' interpretation, which involved a dispute between the witness and the union as to the time when the union contract permitted the witness to begin his working day. [Tr. pp. 778, 1086, 1274-1292, 1294-1296.]

The portions of the indictment dealing with the subject of interstate commerce were sought to be substantiated by two groups of witnesses; one group to establish that supplies were shipped from outside of the State of Nevada into the State of Nevada as purchased by plumbing contractors, and one group representing the wholesalers of plumbing and heating supplies.

The witnesses who testified that supplies were purchased by Nevada plumbing contractors from out-of-state sources submitted voluminous exhibits to establish the truth of this claim. None of these witnesses, however, were able to testify with any certainty as to the duration of time such goods spent on the shelves of the plumbing contractors purchasing these supplies and, in fact, those who ventured a statement with respect to this issue, testified that plumbing and heating supplies, almost without exception, remained on the shelves of plumbing contractors as stock or inventory items for lengthy and varying periods of time before their final use. [Tr. pp. 476, 584-585, 620, 1074, 1081.]

These witnesses further testified that in every instance plumbing and heating supplies were processed in one way or another and joined together with other such supplies during the process of their installation and prior to their sale, as a completed plumbing or heating unit, to the public. [Tr. pp. 392, 447, 572, 586, 943-944, 1075, 1232.]

With respect to the issue of shipments of plumbing and heating supplies directly to the job site or places where the same are installed from sources outside of the State of Nevada, the record also reveals little more than a trickle in contrast to the allegation in the Indictment that "substantial quantities" of plumbing and heating supplies were so distributed. The facts as set forth in the record indicate that only approximately 1% of the total purchases of plumbing and heating supplies during the indictment period can be classified as coming under this category. [Govt. Ex. No. 15, R. p. 387; Govt. Ex. No. 38, R. p. 468; Govt. Ex. No. 74, R. p. 617.]

With respect to the witnesses testifying on behalf of wholesalers and plumbing and heating suppliers, two of such wholesalers were represented. Testimony on behalf of one of said wholesalers casts no light at all upon the issues in the indictment. [Tr. pp. 588-602.] The testimony on behalf of the other wholesaler failed completely to substantiate the indictment since the testimony was that only 7.3½ of the total purchases of his company were in response to prior orders from plumbing contractors, and that even with respect to this small percentage an unspecified but substantial percentage was never, in fact, thereafter delivered to the contractor ordering the goods. [Tr. pp. 469, 470, Govt. Ex. No. 38.]

Once again this Government witness also testified that invariably, insofar as his records showed, plumbing and heating supplies from out-of-state sources remained on the shelves of either the wholesaler or the contractor for a substantial length of time. [Tr. pp. 476, 1074.]

The testimony on behalf of petitioners with respect to the so-called conspiracy to suppress competition, as alleged

in the indictment, was to the effect that an Association had, in fact, been formed by plumbing contractors in Southern Nevada for the purpose of discussion and action for their mutual self-interests in connection with the plumbing and heating business; that an estimator was, in fact, employed by such Association for the mutual benefit of the Association members; that it was the function of such estimator to compute estimates on any job submitted to him for computation and that the results of this computation would be made known to persons interested in bidding for the particular job. [Tr. pp. 1155-1160.]

Petitioners' witnesses denied, however, as had the Government witnesses, that there was any compulsion to use the price as fixed by the common estimator and testified that the practice rather was to use such figure as a guide in making their own independent bids which varied from the price suggested by the common estimator in a far greater number of cases than it coincided with such suggested price. [Tr. pp. 1160-1185, 1267-1270.]

It was further petitioners' position that there was no continuous and uninterrupted flow of commodities from outside of the State of Nevada to their places of installation and use within the State of Nevada, as alleged in the indictment, but rather that any goods purchased from out-of-state sources remained on either the shelves of plumbing contractors or wholesalers for substantial periods of time, and that such goods were thereafter commingled with other goods before finally being installed. [Tr. p. 1152.] Testimony was further adduced by petitioners to indicate that they were not selling plumbing and heating supplies in the form in which they had been imported from out-of-state sources but rather were selling

completed plumbing and heating systems to the ultimate consumer, which systems were a combination of many different plumbing and heating items which were fabricated and processed in various ways before being joined into the completed system. [Tr. pp. 1152-1153.]

Reasons for Granting the Writ.

The law of this case, as set forth by the Trial Judge in his Instructions to the Jury and the decision of the Court of Appeal for the Ninth Circuit, sets forth a view of the important question of Federal jurisdiction under the Sherman Act, which, it is submitted, is far in advance of and in contradiction with previous and recent pronouncements of this Court and many lower Federal Courts upon this subject. In fact, a recent case with an indictment closely similar to that in the instant case (*United States v. Starlite Drive-In, Inc.*, 204 F. 2d 419) led the Court of Appeals for the Seventh Circuit to comment:

> ". . . There is no case of which we are aware that has gone as far as the Government would have us go in the instant situation."

We submit that while the question of the applicability of the Sherman Act to any particular trade or industry is a difficult and complicated one, each case is significant in the sense that many, many thousands of businesses thereafter must be guided by the concepts laid down by the judiciary. The instant case we believe to be of the utmost importance for future conduct of business relations and business affairs in the United States.

1. The instant case is the first cause to reach this Court in which the view of the lower Court has been that there is a *"per se"* doctrine in the field of Federal

jurisdiction under the Sherman Act which would automatically make applicable the provisions of that Act where a price fixing agreement can be shown to operate upon goods which at some time or another came into a state from out-of-state sources, provided only that the participants in the price fixing agreement are "necessary" to the movement of goods in interstate commerce. It should be emphasized that this holding finds irrelevant the following factors:

(a) Whether in fact there has been any interruption ranging from a few months to several years in the flow of goods from out-of-state sources between the time of their delivery to their ultimate destination within a State and their ultimate use or sale in a State.

(b) Whether goods from out-of-state sources are delivered to their ultimate destination inside a State as stock or inventory items rather than in response to specific orders or needs.

(c) Whether the alleged conspiracy to fix prices in fact has had any effect at all upon the flow of goods from out-of-state sources to points within a State.

(d) Whether the effect of the alleged conspiracy to fix prices had anything more than a remote or indirect effect upon the flow of goods from out of state sources to points within a State.

2. The Courts below in this case have rejected as immaterial and irrelevant in the field of Federal jurisdiction under the Sherman Act any finding with respect to the interruption in the flow of goods from out-of-state sources to points within a State based upon the following criteria:

(a) That goods from out-of-state sources were delivered to their point of ultimate destination on the shelves

of wholesalers and plumbing contractors, there to remain for varying periods of time up to several years; that thereafter these plumbing and heating commodities would be combined with other plumbing and heating commodities which themselves had lain upon such shelves for varying periods of time, such commodities in combination then being sold or installed as completed plumbing and heating systems to ultimate users.

(b) That the plumbing and heating commodities were not sold at retail or at wholesale by petitioners but were only sold as portions of plumbing and heating systems which were thereafter installed upon real property within a State—never thereafter, of course, being subject to further trade or commerce either intrastate or interstate.

3. The lower Court's view of the law concerning Federal jurisdiction under the Sherman Act has discarded completely the concept that for goods traveling from out-of-state sources to points within a State to retain their interstate character there must be a continuous and uninterrupted stream as a matter of fact, and has substituted the concept that where persons can be shown to be a "necessary and integral" part of the movement of goods from out-of-state sources to points within a State no showing of a continuous or uninterrupted stream is necessary for a finding of Federal jurisdiction under the Sherman Act.

4. The view of the law of the Courts below with respect to the purpose or effect of a conspiracy to fix prices is that there is no necessity for any allegation or

proof that a conspiracy to fix prices need have any purpose, intent or necessary effect to directly or substantially burden or affect interstate commerce for the Sherman Act to apply. It is their view of the law with respect to the commerce power of the Federal Government that it is sufficient to allege and prove that there has been a conspiracy to fix prices by persons "necessary" to the movement of goods in interstate commerce, and any further showing is superfluous.

5. It is the view of the Court below that Federal jurisdiction under the Sherman Act can be predicated upon a showing that goods which make up less than 5% of the total business of those indicted can subject all of their business activities to the Sherman Act, and that proof that goods in an amount of 2% or 3% of the total purchases and sales of those under indictment can be deemed "substantial" for the extension of jurisdiction under the Commerce Clause.

A detailing of the above indicates, we submit, that the questions here presented are of the utmost importance to the commercial life of this country. Petitioners earnestly submit that there are few if any businesses which would not come within the sweep of the Sherman Act under this view of the law. We do not believe that this was the intention of the framers of that Act nor the understanding of those judges who have interpreted its provisions since.

Summary of Argument.

Petitioners' defense to the indictment of a conspiracy to fix prices under the Sherman Antitrust Act consists of the following major points:

(1) That a conspiracy to fix prices as alleged in the indictment did not exist.

(2) That the activities of petitioners complained of, even if they should be found to exist, did not bring petitioners within the interdiction of the Sherman Antitrust Act for the following reasons:

(a) That petitioners' activities as plumbing contractors were wholly intrastate and did not have any effect other than an indirect, remote and unsubstantial one upon the flow of goods in interstate commerce.

(b) That the plumbing and heating supplies with which petitioners dealt were not in the flow of interstate commerce because their interstate movement had ceased upon their delivery from out-of-state sources to the shelves of wholesalers or petitioners themselves as stock and inventory items. Upon their delivery as aforesaid the goods remained for substantial and varying periods of time before being used by petitioners.

(c) That petitioners were not engaged in the sale of the items delivered from out-of-state sources but sold only plumbing and heating *systems* which required the utilization of plumbing and heating supplies in conjunction with other plumbing and heating supplies combined by the skilled labor of petitioners, and fabricated and

processed into a usable form and thereafter installed as a part of the real estate of Nevada, thereafter never to enter the stream of interstate commerce again.

(d) That plumbing and heating supplies shipped from out-of-state sources which under decided law would be admittedly in the flow of interstate commerce (and which would include, (1) goods delivered from out-of-state sources directly to the job site; (2) goods delivered either to petitioners or to wholesalers and earmarked for specific jobs; or (3) goods shipped to wholesalers in response to specific prior orders by petitioners) were in such relatively insignificant amounts as compared to the total purchases of plumbing and heating supplies by petitioners that petitioners' business activities could not be termed action which had any substantial connection or bearing upon goods in interstate commerce.

(e) That the application of the Sherman Act required a finding of fact that the activities complained of bear some direct rather than remote and incidental connection with goods in interstate commerce.

(f) That the application of the Sherman Act required a finding of fact that the activities complained of must have *some* effect on the flow of goods in interstate commerce.

(3) None of the defenses offered by petitioners as listed in the paragraph above were received either by the Trial Court or accepted by the United States Court of Appeals on review, nor were any of the elements referred

to in that paragraph left for the jury's determination in the Instructions of the Trial Court. Instead the opinion of the Court of Appeals substituted a new *"per se"* concept which would supply as a matter of law all of the prerequisites of Federal jurisdiction referred to upon a finding by the jury that there had been a conspiracy to fix prices upon goods "in interstate commerce" and that the concept of goods "in interstate commerce" could be defined to include goods which came from out-of-state sources at any time so long as the actors whose conduct was complained of were a "necessary and integral" part of their movement interstate. Such a concept eliminates all of the factors referred to in paragraph (2) above and is at odds with a long line of decided cases by this and lower Federal Courts.

(4) The Trial Court committed error by failing to instruct the jury with respect to any phase of petitioners' defense as set forth in paragraph (2) above, and likewise failed to charge the jury in language which was the converse of any of the instructions given.

(5) The Trial Court committed prejudicial error in the conduct of the trial. The record contains repeated instances of hostility to petitioners' trial counsel and the hampering of the presentation of petitioners case while according the prosecution almost unrestricted freedom to place its theory of the case before the jury.

(6) Prejudicial misconduct was manifested by the Deputy United States Attorney in referring to the nature of the punishment and the offense for which petitioners were being tried in his closing remarks to the jury.

ARGUMENT.

I.

Reversible Error Was Committed by the Trial Judge in Failing to Submit to the Jury the Question of Whether the Commodities Involved Were in Fact "in Interstate Commerce."

Since the enactment of the Sherman Antitrust Law the tremendous expansion of the American economy has naturally led to the concomitant and parallel expansion of the concepts of law applicable to a national rather than a localized economy. The commercial life of the nation burst across state lines to encompass the entire continent and Federal jurisdiction over trade and commerce has necessarily kept pace with this development. Despite this expansion, however, the fact still remains that the United States is a federal system of government. The problem of demarcation between federal and state autonomy is admittedly not an easy one. Yet so long as we adhere to a federal structure a reasonable and realistic line of separation must always be sought.

> "The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who formed and those who adopted that instrument meant to carve from the general mass of legislative powers then possessed by the states, only such portions as it was thought wise to confer upon the Federal Government; and in others that there should be no uncertainty in respect of what was taken and what was left to national powers of legislation were not aggregated but enumerated—with the result that that which was not embraced by the enumeration

remained vested in the states without change or impairment."

Carter v. Carter Coal Company, 298 U. S. 238, 294.

"It may not any longer be doubted that the power of Congress and the scope of the Sherman Act's coverage 'extends to those activities intrastate which so affect interstate commerce, or the assertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.' It remains true, however, that the distinction between instrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its regulation, regardless of the particular form which the composition may take, which is the test of federal power'; and that the question of whether the effect on interstate commerce is substantial is still a determining one."

Atlantic Company v. Citizens Ice and Cold Storage Company, 178 F. 2d 453 (C. C. A. 5th, 1949), *cert. den.,* 339 U. S. 953.

A The Trial Judge Committed Error in Instructing the Jury to Disregard, as Having No Relation to the Question of Interstate Commerce, the Fact That the Commodities in Question Had Come to Rest After Their Interstate Journey.

The Trial Judge in Instruction No. 26 [R. p. 130], dealt with the subject of goods which had been shipped in interstate commerce and the effect of their having come to rest within a state. The jury was instructed as follows:

"A combination may be in restraint of interstate trade and commerce within the meaning of the

Sherman Act even though the restraint is applied before the interstate journey begins or after it has ended.

"Prices fixed in advance to affect a product at the end of its interstate journey are an interference with that commerce, although, at the time the sale is actually made, the product originating in interstate commerce may actually have come to rest on the shelf of the 'retailer.' It is the agreement on prices, in advance, which constitutes the violations, not the sale at the price.

"In assaying price-fixing agreements, the test is not so much whether the effect is felt after the movement of the goods has reached the end of the interstate journey. The inquiry seeks the effect upon prices in the market. And if this effect be shown, it matters not that the movement has come to a halt within the state." [R. pp. 130-131.]

Petitioners do not maintain a position in contradiction to that long line of cases from this Court and others holding that where given acts substantially affect the flow of interstate commerce, the mere fact that such acts take place after goods have come to rest within the state will not absolve the actors from liability under the Sherman Act. On the contrary, Petitioners' position has been that the issue of the affect on interstate commerce is a basic issue to Federal jurisdiction, as is indicated by the discussion in Point II, *infra*. In Instruction No. 26, however, the Trial Judge charged the jury that they should disregard the question of whether goods had come to rest within the state without leaving to the jury the question of whether the acts of petitioners had in fact any effect upon the interstate flow of goods. By thus charging the jury with only a portion of the reason for the rule set

forth in this Instruction, the Trial Judge in effect emasculated the entire rule built up over many years and set forth in many cases of this Court, which has sought to draw a line between those acts over which Federal jurisdiction extends under the Sherman Act and those acts which are considered to be intrastate and therefore beyond the reach of the Sherman Act.

Petitioners are not to be understood as taking a position which bases Federal jurisdiction upon any mechanical phrase or test to be applied in a vacuum. The espousal by Petitioners of a coming-to-rest theory to distinguish intrastate from interstate acts arises out of the fact that it is deemed to be a significant and important element of a matter tried under the Sherman Antitrust Act that the acts complained of in the indictment are acts involving goods which have come to rest at their point of destination, which remain at their place of destination for undetermined and varying periods of time before the acts complained of take place, and that admittedly after the acts complained of have taken place the goods in question become a part of the real estate of the state never to be moved again in the channels of interstate commerce.

A substantial amount of testimony discussed under Point III, *infra,* is to be found uncontradicted in the record, to the effect that the overwhelming majority of plumbing and heating supplies were delivered either to wholesalers of plumbing and heating supplies within the State of Nevada as inventory or stock items, or directly to the shops and yards of plumbing contractors as inventory or stock items. In both cases the record is clear and uncontradicted that such materials remained at their place of destination for substantial periods of time before being fabricated into plumbing and heating systems at

their places of installation in Nevada. For this reason petitioners deemed it important and, in fact, partially determinative of the jurisdictional question, to have the jury make a finding as to whether or not by the fact of the plumbing and heating supplies coming to a rest on the shelves of the wholesalers and plumbing contractors within the State of Nevada there had been such an interruption in the interstate flow of the goods that the subsequent acts of petitioners complained of in the indictment could not have constituted acts perpetrated upon goods in the flow of interstate commerce. To that end Defendant's Proposed Instruction No. 18 was submitted but rejected.[1]

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[1]Defendants' Proposed Instruction No. 18:

"Combinations of local character and which affect the local operations of plumbing contractors, even where the object of the combination may be to control the price or conditions of sale of the services of the plumbing contractors, which never were a part of the flow of interstate commerce, or which had ceased to be a part of the flow and had come to rest, do not violate the Sherman Anti-Trust Act and are not within the purview of the language of the indictment, and if you find that the association of the plumbing contractors in this case was of this nature and that the evidence establishes that the plumbing contractors made estimates on jobs to be performed within the State of Nevada and that upon the contract being given to any individual plumbing contractor that such contractor thereafter proceeded to process, fabricate, assemble, integrate or do other plumbing work in connection with the materials and in accordance with plans and specifications given to such plumbing contractor by either the building contractor or particular customer involved, you must find that there is a cessation of the flow of commerce even though some of the materials may have been purchased from out of the state but had come to rest on the shelves or in the warehouse of the plumbing contractor, for a period of time concerning which there is no testimony, and thereafter had been integrated and commingled in the services performed by the plumbing contractor, you must find that there is no violation of the Sherman Anti-Trust Act or under the offense charged in the indictment and you must find each and all of the defendants not guilty." [R. pp. 75-76.]

A comparison of the Instruction rejected with the Instruction given makes clear the fact that in the opinion of the Trial Judge whether or not goods had come to rest upon the shelves of wholesalers or plumbing contractors in Nevada was a fact completely immaterial to the jury's deliberations. This view is at odds with a long line of important cases from this and other courts.

Thus in *Brosius v. Pepsi-Cola Co.*, 155 F. 2d 99 (C. C. A. 3, 1946), the complaint alleged a conspiracy under the Sherman Antitrust Act against the exclusive distributor for Pepsi-Cola within a particular state. The allegation was that there was a conspiracy to fix prices and restrain the interstate trade in the sale of this beverage. The facts showed that the defendant received the beverage concentrate, the bottle caps and labels from out-of-state and that what took place within the state was the addition of charged water, the bottling and the sales. The Court in holding that the conspiracy alleged did not come within the purview of the Sherman Act stated:

> "The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with a mass of property within the state and is there held solely for local disposition and use [citing *Lipson v. Socony-Vacuum Corporation*, 87 F. 2d 276 (C. C. A. 1, 1937); *Jewel Tea Company v. Williams*, 118 F. 2d 202 (C. C. A. 10, 1941); *Walling v. Goldblatt Brothers*, 128 F. 2d 778 (C. C. A. 7, 1942)]. It has been stated that interstate commerce terminates at a point where the parties concerned intended that it should end, *i. e.*, it ceases at the point of its destination and has been delivered to the consignee. See *Dansinger v. Conley*,

1919, 248 U. S. 319, 39 S. Ct. 119, 63 L. ed. 266; *Binderup v. Pathe Exchange,* 1923, 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308." (155 F. 2d 103.)

An important duet of cases from this Court is to be found in *Atlantic Coast Railroad Co. v. Standard Oil Co.,* 276 U. S. 257, and *Standard Oil Co. v. Federal Trade Commission,* 340 U. S. 231. These two cases when read together indicate a line of demarcation which has been drawn within this field of goods coming to rest. There can be no doubt upon a reading of the two cases that the general principle inherent in the test of goods coming to rest is considered to be very much alive and a realistic economic yardstick to be utilized in this difficult field.

In the *Atlantic Coast Railroad Co.* case the facts indicated that the Standard Oil Company sold and delivered to bulk stations owned by the railroad company gasoline and oil which was commingled with other gasoline and oil owned by the railroad company and subsequently delivered to customers of the railroad company. The Court held that after delivery to the bulk stations the movement of the gasoline and oil was intrastate since the railroad company was free to distribute according to the demands of its own business and the destination of the gasoline and oil as far as the seller was concerned was to the bulk stations of the railroad company. Under the economic facts set forth in this case this Court held that the nature of the stoppage of the interstate flow in the commodities was such as to be reflected in law as a break in the interstate character of the goods upon their delivery to the bulk stations.

This showing is to be contrasted with that in the *Standard Oil Co. v. Federal Trade Commission* case

which was similar but which contained essential factual differences leading to a different legal result. In this latter case deliveries by the Standard Oil Company were made within a state to bulk oil stations which stations, however, here owned by the Standard Oil Company itself. Subsequent deliveries to customers of the Standard Oil Company, although coming several months after the initial delivery to the bulk stations, were held by this Court not to break the interstate flow of the goods since this was a mere temporary storage of the goods for purposes and convenience of the Standard Oil Company. Thus a different set of economic facts led to a different legal result.

Petitioners' complaint in this case is that the economic facts were never presented to the jury for a determination by them as to whether the particular facts should indicate one or another legal result. Rather, under the instruction by the Trial Court, the jury was instructed to disregard the fact of goods coming to rest within the state as having no factual bearing on the legal conclusion to be reached.

A case which has direct bearing on the issues in the instant case and which illuminates the importance of a factual finding on the question of an interpretation in the flow of goods interstate is *Walling v. Jacksonville Paper Co.*, 317 U. S. 564. That case dealt with the problem of Federal jurisdiction under the Fair Labor Standards Act and concerned shipments of goods to a

warehouse. This Court clearly distinguished in that case between those goods which were shipped to the warehouse as stock items—which by reason of their having come to rest at the point of their final destination could no longer be held to be goods in interstate commerce—from those goods which were shipped in response to orders based on the anticipation of the needs of certain customers, which, by reason of their more direct connection with the flow of interstate commerce were held to provide a basis for Federal jurisdiction.

An unbroken line of decisions has utilized the coming to rest test under one nomenclature or another as a substantial one for measuring the prerequisites for Federal jurisdiction under the Commerce Clause.

Browning v. Waycross, 233 U. S. 16;

Schechter Poultry Corp. v. United States, 295 U. S. 495;

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465;

Public Utilities Commission v. Landon, 249 U. S. 236.

Petitioners respectfully urge that the lower Court committed prejudicial error by Instruction No. 26 and by rejecting Defendants' Proposed Instruction No. 18, since by its erroneous concept on the law of this subject petitioners were deprived of a valid, substantial defense which occupied a substantial portion of the record and which should have been presented to the jury on proper instructions.

B. The Trial Court Committed Prejudicial Error in Failing to Charge the Jury That a Verdict of Guilty Under the Indictment Required a Finding That the Goods Moved in a "Continuous and Uninterrupted" Stream From Their Sources Outside the State to Their Places of Installation and Use Inside the State.

The error of the Trial Court discussed under subdivision A above was not only not corrected in subsequent instructions but was in fact compounded by Instruction No. 25 given by the Court.[2]

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[2]Instruction No. 25:

"The indictment alleges that there exists a flow of commerce from manufacturers of plumbing and heating supplies located outside of Nevada to their places of installation and use in buildings in Southern Nevada and that the plumbing contractors are conduits through which these supplies manufactured and shipped from other states are sold and distributed to the consuming public in Southern Nevada. It is for you to decide whether this allegation is true beyond a reasonable doubt.

"Specfically, it is alleged that practically all of the plumbing and heating supplies used in Southern Nevada are manufactured in other states and are sold and shipped in interstate commerce from such other states to Nevada for use in Nevada. (Par. 12.)

"It is alleged that plumbing contractors in Southern Nevada are engaged in the business of distributing, selling and installing such supplies and that they make a charge and obtain a profit both from the sale of said supplies and from their services in installing them. (Par. 13.)

"It is alleged that over three-fourths of all such supplies used in Southern Nevada are distributed, sold and installed by the contractors who are members of the Las Vegas Merchant Plumbers Association and the Merchant Plumbers Exchange, and that a major part of these supplies are handled by the plumbing contractors who are defendants in this case. (Par. 13.)

"It is then alleged that manufacturers and wholesalers located outside of Nevada sell and ship directly to plumbing contractors in Southern Nevada more than 40 per cent of all the supplies purchased by said contractors. (Par. 14.)

Instruction No. 25 purports to be a characterization of the essential allegations in the indictment and instructs the jury with respect to those matter which it must find on the question of interstate commerce. Significant differences, however, between the Indictment and the Instruction characterizing it point up what petitioners respectfully urge to be an erroneous concept of Federal juris-

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"It is alleged that the remaining 60 per cent, according to the indictment, are purchased from Southern Nevada wholesalers who have bought them from out of state sources for purpose of resale. It is alleged that substantial quantities of the supplies thus bought from Nevada wholesalers are shipped directly from the out of state sources to the plumbing contractors who have purchased them. It is alleged that substantial quantities of these supplies are also obtained by the local wholesalers pursuant to prior orders placed with the wholesalers by the contractors, and upon receipt from the out of state sources are delivered immediately to the contractors who ordered them. (Par. 15.)

"It is further alleged that substantial quantities of supplies are shipped from out of state directly to the job site or the place where they are installed by plumbing contractors. (Par. 16.)

"Finally, it is alleged that consumers generally do not install plumbing and heating supplies but that this service is customarily performed by a plumbing contractor. The service performed by plumbing contractors in distributing, selling and installing these supplies is alleged to be an integral part of, and necessary to, the movement in interstate commerce of plumbing and heating supplies manufactured outside of Nevada and which are distributed, sold and installed in this State. (Par. 17.)

"These heretofore mentioned matters concerning the flow of commerce are not of themselves unlawful, but if you find these allegations as to commerce to be true, and if you further find beyond a reasonable doubt that the defendants agreed in advance of the shipment of these supplies into the State of Nevada to fix the prices at which they would be distributed and sold after the completion of that interstate journey, then I instruct you that such fixing of prices necessarily affected the free and untrammeled flow of such supplies while they were still in interstate commerce." [R. pp. 128-130.]

diction under the Sherman Act as heretofore decided by this Court.

Paragraph 17 of the Indictment alleges that petitioners plumbing contractors are "conduits through which plumbing and heating supplies" from out of state are distributed to the consuming public in Nevada and that said supplies *"flow in a continuous and uninterrupted stream"* from out-of-state to their places of installation and use in Nevada. [R. pp. 9-10.]

The Court's charge in Instruction No. 25 in characterizing this allegation, however, omits any reference to the flow of supplies in a "continuous, uninterrupted stream" and instead charges simply that the indictment alleges that petitioners are "an integral part of and necessary to the movement in interstate commerce of plumbing and heating supplies manufactured outside of Nevada and which are distributed, sold and installed in this State." [R. p. 129.] Thus the Court emphasized that the jury was not to consider whether the goods were uninterrupted in their interstate movement and sets forth as a substitute concept of law that a violation of the Sherman Act can be found if there has been a conspiracy to fix prices for goods which at any time or under any circumstances find their way into a state from an out-of-state source so long as the conspirators are "an integral part of and necessary to" their interstate movement.

This substitute concept of the Trial Court for the allegations contained in the indictment with respect to the uninterrupted flow of goods is at variance with specific holdings by this Court. This Court has on several occasions held that the mere fact that a particular activity

is necessary to the movement interstate of goods does not provide the basis for Federal jurisdiction.

Hopkins v. United States, 171 U. S. 578, 593-594;

Apex Hosiery v. Leader, 310 U. S. 469;

Cf. United States v. Greater Kansas City Chapter, National Electrical Contractors Association, 83 Fed. Supp. 147.

C. The Trial Judge Committed Error by Failing to Instruct the Jury That the Fact That Petitioner's Activities Related to the Fabrication and Installation of Plumbing and Heating Systems Rather Than the Sale of Plumbing and Heating Supplies Apart From Such Systems Should Be Considered by Them in Determining Whether the Conspiracy Charged Related to Goods in the Flow of Interstate Commerce.

The record reveals without contradiction [R. pp. 392, 447, 572, 586, 943, 944, 1075, 1232] the fact that petitioners as plumbing contractors were not primarily or even substantially engaged in the sale of those items usually referred to as plumbing and heating supplies. On the contrary, the record is clear that petitioners as plumbing contractors were engaged in the business of installing plumbing and heating commodities as a portion of structures which were being constructed within the State of Nevada. To this end petitioners all of whom were experienced plumbers and plumbing contractors, selected various items from their stock such as pipes, valves, elbows, etc., and together with particular appliances such as lavatories, tanks, sinks, etc., combined the various component parts into a unit for its efficient operation within a particular structure. Each step required the addition of labor, the fabrication and processing of

the various items from the treating of the pipes, cutting and fitting, etc., to its final installation as a completed unit within a building.

Since this was the undisputed fact, petitioners sought to introduce into the instructions for the jury's consideration the view that petitioners' activities were intrastate in effect since they dealt not with particular commodities which were passed on to consumers in the same form in which they were purchased, but rather that their activities dealt with goods which were combined by the addition of petitioners' labor with other goods into a plumbing and heating system and that it was the system as a whole which the ultimate consumer purchased from petitioners rather than any particular isolated item of plumbing and heating supply. To this end petitioners introduced Proposed Instructions Nos. 16, 17 and 21. [R. pp. 72, 73, 77-78.] The Trial Court, however, rejected all these instructions and in none of the instructions actually given was the jury charged that the kind of activity by petitioners in pursuing their trade had any bearing upon the issue of interstate commerce.

Once again petitioners wish clearly to disclaim the espousal of any mechanical test by which the question of whether goods are in fact in the flow of interstate commerce can be determined as a simple and uncomplicated matter. However, petitioners earnestly submit that the question of fabrication has some bearing upon the question of whether the goods as set forth in the indictment were in fact in interstate commerce. A case very closely in point is *United States v. San Francisco Electrical Contractors Association* (57 Fed. Supp. 57). That case dealt with electrical contractors but in almost every

other facet the two cases are identical. In that case Judge Yankwich held as follows:

> "But the contractors did not sell electrical supplies to the public or to general contractors. They built what the indictment calls 'electrical systems,' which it defined as 'that combination of electrical equipment by which electrical current is carried into and distributed to residences, apartment houses, and other types of buildings within the San Francisco Bay area. . . .
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> "When [the electrical contractor] bid on a job, he agrees to install an electrical system. His charges are for the completed system. Into the making of his price go electrical articles, cost of the labor of others, his own engineering skill in installing the various parts and combining them into a working whole, his own cost of doing business, and his profit of management.
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> "In other words, the electrical contractor processes the electrical article, into a combination, which he sells at a price in which enters as only one of the elements the price of the article." (57 Fed. Supp. at p. 65.)

This Court has recently, in the case of *Mandeville Island Farms v. American Crystal Sugar Company,* 334 U. S. 219, at p. 238, referred approvingly to the concept that there may be such a change in the character of the commodities in question that this test alone can be held to break the stream of interstate commerce. The cases there cited were *Arkadelphia Milling Company v. St. Louis Southwestern Railway Company,* 249 U. S. 134, and *Cloverleaf Butter Company v. Patterson,* 315 U. S. 148.

The importance of the errors committed by the Trial Court in the instructions referred to in this Point I are

heightened by the fact that at no point did the Trial Court charge the jury that Federal jurisdiction under the Sherman Act required a finding that the activities of petitioners affected the interstate flow of plumbing and heating commodities. The opinion of the United States Court of Appeals below is in agreement with this view of the Trial Court's instructions:

> "The Government may have had two strings to its bow but it obviously failed to fasten one string. Since we hold that the 'affect commerce' theory was never presented to the jury, by instructions, we do not consider rejected instructions . . .
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> "This is a case where the Government proceeded on two alternate theories relating to (1) matters complained of in the flow of commerce, and (2) matters complained of in intrastate commerce substantially affecting interstate commerce after the flow in commerce had ceased. Either theory properly presented to the jury would support a conviction on the facts of this case. The petitioners contended that their activities were wholly intrastate and had in fact no substantial effect on interstate commerce and that their acts were done after the flow of goods in commerce ceased.
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> "This contention, if found by the jury to be true, would be a defense to a prosecution on either the 'in commerce,' or the alternate 'affect commerce' theory. But under proper instructions given on the 'in commerce' theory, the jury found a continuous and uninterrupted flow of commerce through the plumbing contractors as conduits, to the places of installation of the plumbing supplies in Southern Nevada and further found that petitioners conspired to fix prices and to divide the market, *per se* viola-

tions, which as a matter of law, affect the flow of commerce and convicted petitioners." [R. pp. 1530, 1531.]

Despite the language in the opinion just cited to the effect that the jury found a "continuous and uninterrupted" flow of goods in interstate commerce petitioners respectfully submit that this fact question was never properly presented to the jury and that facts in the record bearing upon this all important conclusion were in reality kept out of the jury's deliberations by the instructions.

II.

Prejudicial Error Has Been Committed by the Omission From the Instructions of Any Requirement for Guilt That the Conspiracy in Intent, Purpose or Necessary Effect Have Some Substantial Effect Upon Interstate Commerce and That This Be a Direct Rather Than an Indirect or Remote Relationship.

Several of the Trial Court's instructions to the jury charged them with respect to that aspect of the indictment which alleged a conspiracy among petitioners to fix the prices of plumbing and heating commodities. Notably absent from these instructions is any reference to the concept of a relationship between any such agreement and the effect upon interstate commerce. The balance of the instructions demonstrate that this omission was neither accidental nor cured at some other point in the Instructions.

Instruction No. 18 given by the Court charged the jury that "any combination which by agreement tampers with price structures is engaged in an unlawful activity." [R. p. 123.]

Instruction No. 19 given by the Court charged the jury that while it is perfectly lawful to use a price service or a price book in the regular course of one's business, "when two or more business men agree to use the prices contained in a given price book to fix prices, by the mere fact of so agreeing they have abandoned their status as independent competitors and have become engaged in an unlawful combination to fix prices." [R. p. 124.]

Instruction No. 20 charged the jury that while there was in itself no violation of any law in selecting a common estimator whose services would be made available freely, "if you find that it was agreed that a person to be known as an estimator would be employed to fix prices and determine the amount to be bid by plumbing contractors, including defendant plumbing contractors in their submission of estimates or bids for the sale and installation of plumbing and heating supplies or specific jobs, you are instructed that such agreement is in violation of the Sherman Act." [R. p. 125.]

Instruction No. 22 charged the jury that if they should find that there was in fact an agreement among petitioners to fix the prices at which they would distribute and sell plumbing and heating supplies then irrespective of the amount supplied such agreement would be unlawful under the Sherman Act. [R. p. 126.]

The view of the law thus presented to the jury by these instructions is an extremely narrow one not at all dependent upon (1) whether the alleged conspiracy had any intent, purpose or necessary effect to affect, regulate or burden interstate commerce; (2) whether there was any direct as opposed to a remote relationship to goods in the flow of interstate commerce; or (3) whether the

conspiracy charged had any substantial effect so as to constitute an unreasonable and unlawful restraint upon interstate commerce.

Instructions offered by petitioners on this subject matter but rejected by the Trial Judge are to be found in Defendants' Proposed Instructions Nos. 12, 14, 15, 22 and 24. [R. pp. 68, 69, 71, 79, 80-81.]

The reasoning of the opinion of the United States Court of Appeals in this case would attempt to circumvent any such omissions in the Instructions by propounding a novel *"per se"* doctrine. Thus the Court below states that while the question of substantiality and effect on commerce is relevant to a trial on a theory of "affect commerce" it has no relevance to the theory of "in commerce." The reason given for this conclusion is that where goods are shown to be "in commerce" a conspiracy to fix prices is *"per se"* illegal under the Sherman Act no matter how remote or incidental the effect on the flow of such goods in commerce might be and no matter whether the result of affecting the flow of goods in interstate commerce was within the intent, purpose or necessary result of the agreement. Thus the Court states:

> "Appellants argue that the effect on interstate commerce of the acts complained of, must be substantial. They contend also the question of substantiality should have been submitted to the jury. The question should have been submitted on the 'affect commerce' theory. But we are now concerned with only the 'in commerce' theory remaining in the case.
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> "The test of the impact on commerce is qualitative not quantitative . . . 'Section 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected.' *United States v. Socony-*

Vacuum Oil Company, 310 U. S. 150, 225 ft. note 59 and cases cited therein.

"On the facts of this case discussed heretofore the restraint was substantial. The jury found by its verdict that the defendants as charged in the indictment, had engaged in an illegal conspiracy to fix the price of and divide the market for plumbing and heating supplies, violations *per se* 'flowing' in the stream of interstate commerce. The proscribed and substantial effect of these illegal acts followed as a matter of law. *Ethyl Gasoline Corp. v. United States* (1940), 309 U. S. 436, 458; *United States v. Trenton Potteries Co.* (1927), 273 U. S. 392." [R. pp. 1532, 1533.]

Petitioners earnestly submit that the *"per se"* doctrine thus advanced is an unprecedented one in this field of law and is without support in the cases or in logic. True, a *"per se"* doctrine has been enunciated in Sherman Act cases, but this concept has heretofore been reserved for the principle that where a price fixing conspiracy has been established which is otherwise a violation of the Sherman Act by reason of its being in intent, purpose or necessary result a restraint upon interstate commerce and by reason of its having a direct rather than a remote effect upon interstate commerce, it is no defense that the acts complained of constitute a "reasonable restraint."

United States v. Trenton Potteries Co., 237 U. S. 392;

Ethyl Gasoline Corp. v. United States, 309 U. S. 436;

United States v. Socony-Vacuum Oil Company, 310 U. S. 150.

In the opinion of the Court below, however, the *"per se"* doctrine has been extended beyond this point to include an element which has always been deemed to be a vital prerequisite of Federal jurisdiction itself: namely, that the acts complained of bear a direct and substantial relationship to the flow of goods interstate and not merely some remote and unsubstantial relationship. Applying the reasoning of the opinion of the United States Court of Appeals in this case it would never be necessary to allege—as was done in the indictment herein—or to offer proof that "the purpose, intent and necessary effect of the aforesaid combination has been and is to directly, unreasonably, arbitrarily and unlawfully restrain and obstruct the flow" of goods in interstate commerce. [R. p. 12.] For according to this view, those elements are supplied as *a matter of law* upon a showing that there has been a conspiracy to fix prices of commodities "in commerce." We submit that no such view has been accepted before in this field and indeed that the contrary is true: Federal jurisdiction under the Sherman Act depends in the first instance upon a factual showing that the acts complained of have a direct and substantial, as opposed to an indirect and remote, effect upon the flow of goods in interstate commerce.

> ". . . the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which *directly and substantially, and not merely indirectly, remotely, incidentally and collaterally,* regulate to a greater or less degree commerce among the States . . .
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> "If the *necessary, direct and immediate effect* of the contract be to violate an act of Congress and

also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed.

"Where the contract affects interstate commerce only *incidentally and not directly,* the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress . . . We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which *directly affect and regulate* that commerce . . ." *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 229, 234, 235. (Emphasis added.)

"The distinction between *direct and indirect* effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear . . . But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions . . ." *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 547. (Emphasis added.)

"Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. Use of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy . . . If thereby the shipment of steel in interstate commerce was curtailed, that result was *incidental, indirect, and remote, and, therefore, not within the anti-trust acts,* as this court, prior to the filing of the present bill, had already held . . ." *Levering & Garrigues Co. v. Morrin,* 289 U. S. 103, 107. (Emphasis added.)

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing or growing crops—and if, by a resulting dimunition of the commercial demand, interstate trade was curtailed either generally or in specific instances that was a fortuitous consequence *so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." Industrial Association of San Francisco v. United States,* 268 U. S. 64, 82. (Emphasis added.)

A recent decision of this Court which has considered in detail the issues here involved is the case of *Mandeville*

Island Farms v. American Crystal Sugar Co., 334 U. S. 219. In that case, had this Court adopted the view of the Trial Court and the United States Court of Appeals as reflected in the instant case the decision instead of requiring a number of pages could have been delivered in a few paragraphs.

In the *Mandeville* case this Court considered the applicability of Sections 1 and 2 of the Sherman Act to a complaint for treble damages by growers of sugar beets against sugar refiners having a complete monopoly over the purchase, refining and interstate shipment of the sugar and sugar beets. It was alleged that these refiners entered into an agreement to fix prices and otherwise regulate the conditions of sale and distribution of sugar and sugar beets. These allegations were admitted since the case came to this Court on demurrer. Far from disposing of the case by a statement that because there was a conspiracy to fix prices with respect to goods "in interstate commerce" the Sherman Act had been violated, the Supreme Court delivered a detailed and searching analysis of the reasons why the allegations concerning this particular conspiracy stated a cause of action under the Sherman Act. Again and again throughout the decision this Court referred to the requirement that before the Sherman Act is applicable to a price fixing conspiracy there must be some direct relationship between the conspiracy and interstate commerce, and that there must be some substantial effect upon interstate commerce.

Reviewing the various decisions which had held the process of manufacture to be a purely local activity and for that reason alone beyond the scope of the Sherman Act, this Court underscored the more recent cases in

which a realistic economic point of view was adopted instead of a mechanical one. The real test to be applied, said the Court, was "the practical impeding effect" upon interstate commerce rather than any shibboleth of "production" or "manufacture," "incidental" or "indirect." (334 U. S. at 231, 233.) In the process of determining whether any combination or conspiracy alleged to be in violation of the Sherman Act in fact comes within its proscription, however, the Court indicated with clarity the tests to be applied:

> "The inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process, is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. [Footnote No. 14: In *United States v. Frankfort Distilleries,* 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. ed. 951, we said:
>
> > 'It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the anti-trust laws on the basis of the purely local aims of a combination, insofar as its aims were not modified by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.'
>
> The decisions cited were *Industrial Association of San Francisco v. United States,* 268 U. S. 64, 45 S. Ct. 403, 69 L. ed. 849; *Levering and Garrigues Company v. Morrin,* 289 U. S. 103, 53 S. Ct. 549, 77 L. ed. 1062; *United Leather Workers v. Herkert and Meisel Trunk Company,* 265 U. S. 457, 44 S. Ct. 623, 68 L. ed. 1104, 33 A. L. R. 566; *cf. Local 167 of International Brotherhood of Teamsters v.*

United States, 291 U. S. 293, 297, 54 S. Ct. 396, 398, 78 L. ed. 804; and *United States v. Hutcheson,* 312 U. S. 219, 61 S. Ct. 463, 85 L. ed. 788.] *For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence."* (334 U. S. 234.) (Emphasis added.)

The Court in the *Mandeville* case next turned to a discussion of the same rule of substantial affectation upon interstate commerce from a slightly different perspective. The concept which had been advanced in *United States v. Frankfort Distilleries, supra,* with respect to the test to be applied in determining whether a price-fixing conspiracy came within the purview of the Sherman Act was approved and reiterated and applied to the facts as resented in the amended complaint. This rule as set forth in the *Frankfort Distilleries* case was evolved for a set of facts where the conspiracy was alleged to apply to a price-fixing scheme covering retail sales of liquor within a particular state. The conspiracy in that case not only fixed the retail prices at which liquor was to be sold within the state, but, in addition, governed the type of agreement used in making interstate sales and compelled price maintenance contracts for out-of-state producers of alcoholic beverages. The defendants in that case argued alternatively that either they were not covered by the Sherman Act because retail sales were wholly intrastate, or else that the state's power to control liquor traffic made the Sherman Act inapplicable. The Court there,

in language later specifically approved in the *Mandeville* case, held as follows:

> "These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which took place within a state. In resolving them, *there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a major program dependent for its success upon activity which affects commerce between the states.* It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-trust laws on the basis of the purely local aims of a combination, insofar as those aims were not modified by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly turn upon interstate commerce." (324 U. S. 297.) (Emphasis added.)

The Court in that case held that although the conspiracy might have dealt as one of its functions with the fixing of the intrastate sales price of liquor, it was essential to the success of this conspiracy that interstate traffic in the commodity be reached and controlled:

> "Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales. Its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts . . . Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will." (324 U. S. 293, 298.)

The Court in the *Mandeville* case adopted a similar line of reasoning with respect to the facts there presented. They held that while the conspiracy to fix prices for the purchase of sugar beets might under some circumstances not then presented to the Court be considered an intrastate activity, under the facts presented by the amended complaint it was clear that the whole basis for this intrastate activity was the subsequent refinement of sugar from the beets and its interstate shipment:

> "We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product; or the effects, if any, of such a change in particular situations unlike the one now presented. (Citing in a footnote at this point *Arkadelphia Milling Company v. St. Louis Southwestern Railway Company,* 249 U. S. 134, 39 S. Ct. 237, and *Cloverleaf Butter Company v. Patterson,* 315 U. S. 148, 62 S. Ct. 491.) . . . But under the facts characterizing this industry's operation and the tightening of controls in this producing area, by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed, they permeated the entire structure of the industry in all its phases, intrastate and interstate.
>
> "We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate

> sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultivation and harvesting, the quantity of beets purchased and rejected, the refining and the distribution of sugar both interstate and local." (334 U. S. 238-239.)

The true import of the *Mandeville* case has, we submit, been properly assessed by the United States Court of Appeals for the Seventh Circuit in a recent case involving an indictment similar to that involved in the instant case. In *United States v. Starlite Drive-in, Inc.*, 204 F. 2d 419 (C. C. A. 7, 1953), the indictment charged the defendants with a conspiracy to fix prices for admission to drive-in theatres as a violation of Section 1 of the Sherman Act. The indictment contained the allegation that all motion pictures came from out of state and that by fixing prices the flow of interstate commerce was necessarily restrained. The Court in that case in dismissing the indictment stated as follows with respect to the argument that Federal jurisdiction necessarily followed as a conclusion of law from a conspiracy to fix prices of goods "in commerce":

> "We are not unmindful of the fact that the commerce clause has been broadly interpreted, in fact, to such an extent that it sometimes appears that there is embraced in its broad scope all the activities of mankind. Notwithstanding, there is no case of which we are aware that has gone as far as the Government would have us go into the instant situation.
> . . .

"True, there are cases which hold that restraints on local commerce are illegal if their result is a substantial and adverse effect on interstate commerce. Illustrative are *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219 . . . In the *Mandeville* case three sugar refiners agreed to buy beets at a price predicated on the average net return of all three from the sale of sugar rather than upon the separate returns of each purchasing refiner, as they formerly had done. The result was that under refiners' agreement, the refiners all paid uniform prices for beets of the same quality. The court's decision turned on the fact that the effect of the act in fixing uniform prices for their purchases of raw material necessarily was to reduce competiion between them in the interstate distribution of their finished sugar products. Neither this case nor any other, however, supports the theory advanced here that local activities are illegal simply because thev concern articles which have previously moved in interstate commerce. Nor do they hold that a price fixing agreement between local retailers dealing in a product produced in another state is illegal in the absence of a specific showing of the effect of the conspiracy on interstate commerce." (204 F. 2d 419, 421-422.)

The most recent decisions by this Court on this subject matter are to be found in *United States v. Employing Plasterers' Association,* 74 S. Ct. 452, and *United States v. Employing Lathers' Association,* 74 S. Ct. 455. In those cases this Court held sufficient indictments against groups similar to petitioners engaged in the construction industry, but in both of those cases this Court specifically referred to allegations relating to the effect of the acts

complained of upon interstate commerce. The opinion in one of those cases clearly states the reqirement that this allegation must be substantiated by evidence:

> ". . . It goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens upon the free and uninterrupted flow of plastering materials in Illinois." (*United States v. Employing Plasterers' Association,* 74 S. Ct. at 454.)

It is submitted that the entire emphasis of the recent decisions of this Court in dealing with the Sherman Antitrust Act has been that instead of deciding cases by the use of labels courts must look to the economic realities beneath them to determine whether or not any alleged conspiracy in fact has a direct and substantial effect upon interstate commerce and whether any given alleged conspiracy realistically operates wholly within a state or whether for its very success it is dependent by intent or necessary effect upon reaching beyond state lines. We submit that the view of the law as reflected by the instructions of the Trial Court in this case and the decision of the United States Court of Appeals herein in fact are a return to the older technique of deciding an antitrust case by the application of labels rather than by a consideration of the economic circumstances of the facts before it.

III.

The Evidence Does Not Substantiate the Allegations in the Indictment With Respect to the Existence of an Interstate Flow of Commodities nor Is the Evidence With Respect to Interstate Commerce Sufficient to Sustain the Verdict.

The allegations of the indictment in this case set forth a pattern of flow of goods in interstate commerce designed to come within decided cases of this Court. Thus it is alleged that substantial quantities of plumbing and heating supplies are purchased from out-of-state sources by Nevada wholesalers in response to prior orders and that upon receipt of such supplies they are immediately delivered to the plumbing contractors who ordered the same [Par. 15, R. pp. 8-9]; that substantial quantities of plumbing and heating supplies are shipped from out-of-state sources directly to the job site or the place where the same are installed by the plumbing contractors in Nevada [Par. 16, R. p. 9]; and that plumbing and heating supplies flow in a continuous and uninterrupted stream from out-of-state sources to their places of installation and use in buildings in Nevada. [Par. 17, R. pp. 9-10.]

As has been discussed under Points I and II, *supra*, the jury was not charged and therefore did not find that the activities of petitioners affected commerce in any manner whatsoever. The state of the record therefore requires that the verdict of guilt be sustained if at all upon a finding that there is sufficient evidence in the record to justify the allegations of the complaint with respect to interstate commerce set forth in the three paragraphs paraphrased above.

A. The Issue of a "Continuous and Uninterrupted" Flow of Goods.

With respect to the issue of the "continuous and uninterrupted" stream of goods from out-of-state to places of installation and use in Nevada, it has already been pointed out (Point I, *supra*) that the jury did not make any finding on this issue because the charge by the Trial Judge did not contain this language, and that in addition, as set forth in Point I, *supra*, the law with respect to a continuous and uninterrupted movement was not properly presented for the jury's deliberations. However, since the presence of a continuous and uninterrupted stream is essential to a finding of Federal jurisdiction, petitioners deem it important to analyze the evidence in the record to demonstrate that far from establishing such a "stream" the evidence in fact clearly indicates the contrary: That except for an inconsequential proportion of goods, plumbing and heating supplies are purchased from outside Nevada by wholesalers and plumbing contractors and that these supplies remain for varying and substantial periods of time upon the shelves of the purchasers in the nature of stock and inventory.

Few of the witnesses who testified on behalf of the Government had any knowledge as to the length of time which the commodities which had commenced their journey from another state reposed on the shelves of plumbing contractors within the State of Nevada or on the shelves of Nevada wholesalers of plumbing and heating supplies. [R. pp. 343, 369, 371, 391, 431, 446, 456-457, 477, 584-585, 593-596, 620.]

The few witnesses who hazarded a guess as to the "flow" of these materials testified that they remained on

the shelves of plumbing contractors for substantial and varying lengths of time. [R. pp. 476, 584-585, 620, 1074, 1081.]

The record is replete wih uncontradicted testimony both from Government witnesses and petitioners with respect to the normal and prevailing method of operation: That purchases were made from out-of-state sources, and except in very special instances, remained on the shelves of plumbing contractors and wholesalers for varying periods of time; that the various supplies such as valves, fittings, fixtures, etc., had to be processed and combined with other supplies before they became useful; that pipe had to be cut, fitted and treated before installation; and that the processing of the various plumbing and heating supplies normally took place in the shop of the plumbing and heating contractor, or in the unusual event that the particular job was of such character that the normal facilities of the contractors' physical layout could not accommodate fabrication in the shop, then the work was done on the job. [R. pp. 392, 447, 572, 586, 943, 944, 1075, 1232.]

Thus the allegation with respect to "continuous, uninterrupted streams" from out-of-state sources to places of installation is completely without foundation in the record. If analogies are to be indulged the record instead of revealing a continuously moving stream resembles rather a series of dams out of which from time to time flow commodities which have been intermingled with other commodities, which themselves have remained dammed up for varying periods of time.

B. The Issue of Goods Purchased to Meet Specific Prior Orders.

With respect to the allegation that substantial quantities of plumbing and heating supplies are purchased from out-of-state sources by wholesalers in response to specific orders placed with the wholesalers by the plumbing contractors and that upon receipt of said supplies they are immediately delivered to the plumbing contractors who ordered the same, the record is equally devoid of support. Only two wholesalers testified in support of this allegation and only one of these wholesalers—Standard Wholesale Supply—testified directly with respect to any fact material to this issue [Govt. Ex. No. 38; R. p. 468] sets forth the evidence with respect to this issue and shows that a total of $13,915.51 represents the total of all "special orders" placed by the Standard Wholesale Supply during the indictment period. This figure represents approximately 7% of the total purchases made by Standard Wholesale Supply during the indictment period. To assess the extent of this kind of ordering as opposed to the method by which orders for plumbing and heating supplies were made during the indictment period, and accepting the Government's figure of $646,062.91 as the total of plumbing and heating supplies purchased by wholesalers and plumbing contractors in Nevada during the indictment period (Br. of Resp. in United States Court of Appeals, Schedule D Appendix, p. vii), the percentage of plumbing and heating supplies thus ordered by the wholesalers in response to specific prior orders amounts to 2%.

The unsubstantial percentage involved in this manner of ordering supplies is further reduced by the testimony

of the representative from Standard Wholesale Supply who testified that it was frequently the case that even with respect to these special orders the contractor who had ordered the materials in the first place no longer was in a position to in fact accept delivery when they were received by the wholesaler because he had filled his needs either from another supplier or by a substitution. [R. p. 470.] Thus anything like an exact figure is not available from the evidence since the Government did not produce any evidence sufficiently definite to permit an exact dollar volume of goods involved in this category.

Despite the lack of certainty in the evidence, however, it can be stated, we submit, that the volume of interstate shipments represented by orders proved to have been made by plumbing wholesalers in response to specific prior orders from plumbing contractors and thereafter delivered to those contractors hardly justifies the allegation in the complaint and most certainly does not justify a conclusion that Federal jurisdiction has been established.

C. The Issue of Shipments From Out of State Sources Direct to Job Site.

With respect to the allegation relating to shipments of plumbing and heating supplies directly to the job site or place where the same are installed from sources outside the State of Nevada, the record also reveals little more than a trickle. Following are the only shipments which the evidence in the record establishes as coming under this category:

> Shipment from Coast Valve and Supply Company in Huntington Park to site of job in Las Vegas, $3,939.01. [Govt. Ex. No. 15; R. p. 387.]

Direct shipment by Standard Wholesale Supply to site of job for United Plumbing Company, $1,-215.16. [Govt. Ex. No. 38; R. p. 468.]

Four shipments made on the account of Ritter Co. totaling $1,407.66. [Govt. Ex. No. 74; R. p. 617.]

The total of these shipments amount to $6,562.27 or approximately 1% of the total purchases of plumbing and heating supplies during the indictment period.

Thus all of the categories relied upon by the Government to establish that the goods in question are in the flow of interstate commerce add up to only an insignificant percentage of plumbing and heating supplies during the indictment period. Adding together the three categories mentioned (that is, shipments directly to job sites from out-of-state sources, purchases by wholesalers in response to specific prior orders, and sales to plumbing contractors from outside sources which were earmarked as to destination), the total amounts to $21,397.57. This total represents 3.3% of the total purchases of plumbing and heating supplies made by members of the petitioners plumbing contractors' organization during the period of the indictment.

While analogies from other fields are not always directly applicable, it is interesting to compare the volume of goods admittedly in the flow of interstate commerce with the amount of such goods required to establish jurisdiction under the Fair Labor Standards Act. One line of cases committing the Second Circuit of the United States Court of Appeals has held that in order to establish jurisdiction under the Fair Labor Standards Act with respect to the coverage of the Act for building maintenance

employees there must be a showing that at least 20% of the tenants of the particular building are engaged in the production of goods for interstate commerce. Under these circumstances alone that Court has held that the word "substantial" is given its proper meaning with reference to interstate commerce.

Baldwin v. Emigrant Industrial Savings Bank, 150 F. 2d 524 (C. C. A. 2, 1945);

Gangi v. D. A. Schulte, Inc., 150 F. 2d 694 (C. C. A. 2, 1945).

It is earnestly submitted that the matter of establishing Federal jurisdiction in a Sherman Act case requires in the first instance a finding that there is some substantial relationship between the activity complained of and the flow of interstate commerce, whether this be in the matter of "affecting" interstate commerce, or whether the emphasis be upon the "flow" of goods in interstate commerce. As this Court has said, the concept of interstate commerce is an "intensely practical concept drawn from the normal and accepted course of business." (*United States v. Yellow Cab Company,* 336 U. S. 218, 231.) Were it not for this realistic approach there is little doubt that Federal jurisdiction would be all inclusive and state jurisdiction a thing of the past, since it is quite obvious that there are no real boundaries within the United States for commercial transacions. Very few if any commercial enterprises complete the circle from raw materials through fabrication to the process of distribution wholly within the boundaries of a single state. Or economy is so

closely knit that of necessity there is a frequent passage over state lines at some stage or another in the life of every commercial transaction. Nevertheless the concept of interstate commerce under the Sherman Act has always been limited to that kind of commercial transaction which as a practical matter is by its very nature dependent or utilizes the passage across state lines as the normal, usual and necessary mode of transacting business. Conversely this Court has been actuated in the past by the practical nature of business dealings within the United States in refusing to extend Federal jurisdiction under the Sherman Act so far as to encompass within its orbit commercial dealings which were primarily localized and intrastate and whose interstate character was only incidental and indirect.

Certainly the facts adduced in this case indicate with unmistakable clarity that the business of the plumbing contractors here involved and the acts complained of in the indictment are almost wholly intrastate with only an unsubstantial and insignificant percentage of the business involving interstate flow of commodities as those terms have heretofore been defined. To extend Sherman Act jurisdiction to petitioners herein under the facts set forth in the record would absolve practically no business enterprise in the United States from Federal jurisdiction. We do not believe that such was the policy nor that such is the meaning of the Sherman Act or the decisions of this Court interpreting its effect.

IV.

The Evidence Is Insufficient to Sustain the Allegation in the Indictment That a Conspiracy to Violate the Sherman Antitrust Act Existed Among Petitioners.

Naturally, the gist of the charge against petitioners was a conspiracy among themselves to violate the Sherman Antitrust Act in the manner set forth in the indictment. Without this concert of action there would of course be no crime since it is not the action of any one individual but rather the unified action of several which constitutes the offense. The judgment of *"guilty,"* therefore, necessarily carries with it a finding that such a concert existed. The evidence, however, not only points as strongly in the direction of innocence, but even more, lacks that degree of certainty with respect to the issue of the existence of a conspiracy which would justify a jury of reasonable men in finding that a conspiracy existed beyond any reasonable doubt.

The first witness, Walter Bates, testifying with respect to the alleged conspiracy, set forth in an early point in his testimony the complete theory of the Government: that an association was formed by petitioners for the purpose of allocating among its members the various plumbing jobs which became available; that a central estimating bureau would fix a price which the plumber to whom the job was allocated would quote to the prospective customer; that other members of the conspiracy would then submit fictitious higher bids to encourage the customer to accept the bid of the plumber to whom the job had previously been allocated by the association; and that the Labor Union having jurisdiction over plumbers

would restrain its membership from working for any plumbing contractor who did not conform with this arrangement. [Tr. pp. 521-531.]

Despite this testimony, however, he readily admitted, on cross-examination, that no such committee was ever established at any meeting that he attended and that he had no direct knowledge of any such committee other than a general discussion among members of the Association. [Tr. p. 560.]

Another prop supporting the testimony of a conspiracy as alleged was necessarily an agreement that all of the members of the conspiracy would adhere to the price estimate supplied them by the central estimating bureau allegedly established by the association, and Mr. Bates testified that that was the arrangement. [Tr. p. 521.] Yet, on cross-examination, Mr. Bates admitted that there was no obligation to accept the estimate supplied by the central estimator and that each member was free to use his own discretion with respect to the price actually bid for any job. [Tr. p. 577.]

The next Government witness, Jack Swan, was the person employed as the central estimator himself, and his testimony should have established clearly the existence of a conspiracy, as outlined by the indictment. Mr. Swan produced his record book which supposedly contained the conclusive proof that the allocation system existed and had been set up—which document, Exhibit 58, was invested with such importance by the United States Attorney that he found it necessary to transform its color from a blue book to a "little black book" to shroud its existence in an aura of villainy. [Tr. p. 1378.] Exhibit 58, Mr. Swan testified, contained a list of the various

jobs which the Allocation Committee of the Association had allocated to one or another members of the Association and the evidence of this allocation was that, although a job listing might contain several names of plumbing contractors, one of these names was circled and it was this person to whom the job had been allocated. [Tr. p. 651.]

Once again, however, the witness completely reversed his testimony on cross-examination and stated that the circle was actually made by him *after* he learned who had obtained the job rather than the person who had been allocated the job in advance. [Tr. p. 675.]

Mr. Swan further destroyed the conspiracy theory of the Government by stating that during the time that the alleged compulsory allocation and price fixing system was in existence, there were many jobs performed by one or another member of the Association which he did not estimate. [Tr. p. 680.]

The next Government witness, Ivan Larkin, further illustrates the diaphanous nature of the evidence relating to the alleged conspiracy. Mr. Larkin was an alleged co-conspirator with petitioners, although unindicted, and therefore should have been in a position to give direct testimony with respect to the various elements of the conspiracy. His testimony commenced with a most positive assertion that an allocation committee was in existence during the time that he was a member of the alleged conspiracy. [Tr. p. 803.] Yet, in almost the same breath, Mr. Larkin tesified that his knowledge of such committee was not direct but only hearsay since he himself had never attended any meetings of this committee and had no direct observation of its functioning. [Tr. p. 823.]

As an example of the working of the alleged conspiracy, Mr. Larkin testified with respect to a specific instance in which an allocation had been made: The allocation of the "Ward & Ward" job to petitioner Jack Hynds. [Tr. p. 807.] Later testimony developed, however, that this job was not performed by anyone, and that no contract for its performance was in existence. [Tr. p. 958.] In fact Government Exhibit 58 reveals that, despite the testimony of Mr. Larkin that all had agreed that Mr. Hynds should have this job, a bid even lower than that of Mr. Hynds was made by Mr. Nay.

Mr. Larkin further destroyed the substantiality of any proof of the conspiracy as alleged in the indictment by stating that there was no compulsion that he knew of requiring him to use the bid obtained by the central estimating bureau which had been set up by the Association. [Tr. p. 816.]

The next Government witness, J. M. Ritter, was another unindicted co-consiprator in the alleged conspiracy. Once again one would expect from such a witness direct and positive evidence with respect to the nature of the conspiracy, the existence of its manifestations and the compulsory qualities alleged. Yet, Mr. Ritter knew only that there was "supposed to be" an Allocation Committee and had no testimony other than such a vague guess to substantiate his opinion. [Tr. p. 939.]

Contrary to the indefinite nature of his testimony with respect to the existence of the conspiracy, however, he testified positively that there was never any interference from the Association or from the Trade Union on any job which he had done [Tr. pp. 957, 958] and in addition that there was no compulsion upon him to follow the

estimate which he received voluntarily from the central estimating bureau. [Tr. p. 957.]

This testimony from Government witnesses was then followed by two of the defendants, Bernard V. Provenzano and James T. Humphrey, the testimony of both of whom was completely consistent with the testimony given by Government witnesses.

Mr. Provenzano testified that not only was there no compulsion for him to use the price submitted by the central estimating bureau but in fact that he had *never* used the estimates obtained from Mr. Swan on any job which he had bid. [Tr. p. 1160.] This witness gave at some length and detail the differences between the estimates as shown by Mr. Swan in Exhibit 58 and the bids which he, an alleged conspirator, actually made on the various jobs. [Tr. pp. 1178-1185.]

Mr. Humphrey testified that he did in fact receive estimates from Mr. Swan of the central estimating bureau but that of the 63 jobs which he had completed during the indictment period, he received his estimates on only two occasions and did not follow them on any occasion. [Tr. pp. 1268, 1270.]

Thus the entire proof adduced by the Government to substantiate the indictment is to the effect that a central estimating bureau was set up by the Association for the purpose of providing a standard which the various members of the Association might use if they so desired. The evidence also shows that a record was kept by the Associa-

tion of the plumbing contractor who actually obtained the job together with some of the bids which had been made by various contractors on these jobs. The Instructions of the Court themselves, moreover, demonstrate that the Government agrees with petitioner that no violation of the Sherman Antitrust Act can be spelled out from the existence of such a central estimating bureau or the submission of estimates by such bureau to be used as a guide by members of an association. [Instructions Nos. 19, 20, Rep. Tr. pp. 123, 125.] Yet, not only is the record devoid of any evidence that an allocation committee was in existence or that members of the alleged conspiracy agreed to follow the estimates of the central bureau but the record affirmatively shows that there was a complete lack of compulsion to follow such estimates and, in fact, in the great majority of cases, such estimates were not submitted as the bid at all.

What remains, therefore, in the record is no conspiracy to fix prices by the method outlined in the indictment but a perfectly legitimate trade association which has established a central estimating bureau paid for by members of the Association to obtain a guide for the individual and independent actions of the members of the Association. The evidence with respect to the conspiracy as alleged in the indictment certainly falls far short of that calibre which an appellate court may say could have convinced a jury beyond a reasonable doubt of the existence of a criminal conspiracy.

V.

The Trial Court Committed Prejudicial Error in Refusing to Instruct the Jury in Any Single Particular With Respect Either to Petitioners' Theory of the Case or With Respect to the Converse of Any of the Instructions Given.

Although a large number of instructions were requested on behalf of petitioners, a substantial portion of which dealt with the question of interstate commerce, not one of these instructions was given by the Trial Court. An examination of these instructions (particularly Defendants Proposed Instructions Nos. 10, 12, 13, 16, 17, 18, 19, 22, 24, 25, 26, 27 and 53) [R. pp. 66, 68, 72, 73, 75, 76, 79, 80, 81, 82, 83, 99] indicates that petitioners' theory at the time of trial was as follows: Petitioners deny the charges with respect to the formation of a conspiracy the charge with respect to the fixing of prices, the allocation of jobs and the denial of experienced workmen to those contractors not designated by the conspiracy; that even the presence of such a state of facts would not constitute a violation of the Sherman Act; that even assuming that substantial amounts of plumbing and heating items were shipped into Nevada from out-of-state sources, the effect of the alleged agreement among petitioner plumbing contractors in its intent and necessary effect was not such a direct, substantial and immediate restraint of trade and interstate commerce as to constitute a violation of the Sherman Act; and that even assuming that all of the items which went into a completed plumbing and heating system were brought into Nevada from out-of-state sources, the Sherman Act was not applicable because the interstate movement of these goods had become interrupted prior to the effect

of the alleged agreement among petitioner plumbing contractors because of the fact that such goods normally remained for substantial periods of time upon the shelves of wholesalers and petitioner plumbing contractors and because of the fact that such goods were commingled with other goods by the addition of skilled labor into the fabrication and construction of finished plumbing and heating systems.

Although this position is well substantiated by the cases cited in Points I to V above as a reasonable construction of the present law with respect to the application of the Sherman Antitrust Act, the Trial Judge refused to instruct the jury in accordance with any of these numerous requests. Thus petitioners were in effect denied the right to have placed before the jury their view of the evidence and their interpretation of the proof which had been adduced. Such refusal on the part of the Trial Court is prejudicial error.

Little v. United States, 73 F. 2d 861 (C. C. A. 10, 1934);

Jenkins v. United States, 59 F. 2d 2 (C. C. A. 5, 1932) (cert. den., 287 U. S. 628);

People v. Gallagher, 107 Cal. App. 425, 290 Pac. 504;

State v. Hughes, 43 N. M. 109, 86 P. 2d 278;

State v. White, 46 Idaho 514, 266 Pac. 415;

Alexander v. State, 66 Okla. Cr. Rep. 5, 89 P. 2d 332.

Along these same lines the Trial Court further committed error by failing to charge the jury conversely to the manner in which the jury was in fact charged. Thus, at no point in the instructions was the negative of the

Government's position put forth with respect to any of the substantially deciding issues presented to the jury. As part of the instructions, a criminal defendant is entitled to have the converse of controlling instructions given for his benefit.

Little v. United States, 73 F. 2d 861 (C. C. A. 10, 1934);
Davis v. State, 214 Ala. 273, 107 So. 737;
Smith v. Commissioner, 262 Kan. 6, 89 S. W. 2d 3;
People v. Hoefle, 276 Mich. 426, 267 N. W. 644;
Commonwealth v. Kluska, 333 Pa. 65, 3 A. 2d 398.

VI.

The United States Attorney Was Guilty of Prejudicial Misconduct in His Closing Argument to the Jury in Referring to the Nature of the Punishment for the Offense for Which Petitioners Were on Trial

The United States Attorney, in his closing remarks to the jury, referred with some emphasis to the nature of the punishment involved in connection with the offense for which petitioners were on trial. The purport of the remarks set forth below was obviously an attempt to convey to the jury that they should not regard too seriously a conviction of guilty, since the punishment was really so trivial:

> "As my friend, Mr. Schullman, pointed out this afternoon, the use of the word 'conspiracy' is no crime. The Court will instruct you that in an anti-trust case there is no specific criminal intent necessary. *The offense against the anti-trust laws is not*

a felony. But that is not required, what lawyers call criminal intent. You all know that in a murder case it must be proved, not only was the murder committed, but it was committed with malice aforethought. That is not involved here. We have here a statute which more than sixty years ago *Congress enacted to be a misdemeanor. You have many ordinances in your own communities which are misdemeanors. One of the ones which all of us run afoul of most frequently perhaps is overrunning a stoplight with an automobile.* Now it doesn't make any difference whether you went through the *red light* and whether you saw it or didn't or intended to violate the law or didn't, doesn't make any difference. If a law enforcement officer sees you doing it, he gives you a ticket *and you are charged with a misdemeanor,* a violation of an ordinance, which says you should not go through a *red light.*

"The Sherman Act is *simply an act reserving* (*sic*) competition in business where there is an effect upon interstate commerce.

"It gives a green light to businessmen who act independently of each other in fair and open competition, *and it gives a red light* to combinations and associations of businessmen who act collectively and in concert to suppress competition of others." (Emphasise added.) [Tr. pp. 1450-1451.]

The impact of the quoted words in reducing a charge of criminal conspiracy under the Sherman Act to the status of a traffic violation may well have had a consid-

erable effect upon the jury's determination. Instead of arguing to the jury, as should properly have been done, the Government's view of the evidence in as forceful a manner as he saw fit, the United States Attorney sought to divert the minds of the jury from the seriousness of the charge by an analogy to an experience in the everyday lives of the jurors which is not regarded by most people as a crime. The constant reference in the cited passage to traffic violations, misdemeanors, green and red lights, could only have meant to the jury that the punishment which would be meted out to petitioners would be simply a nominal or reasonable fine rather than any serious consequences. In their deliberations the jurors might very well have taken this into consideration to resolve some of their doubts in favor of conviction, where in the absence of such a concept the Government might have been held not to have established its proof beyond a reasonable doubt.

Unfortunately, reference to the degree of punishment or sentence involved in a particular case for a particular defendant by prosecuting attorneys are not novel in criminal law cases. Indeed, it seems almost as though the device is utilized consciously to help bolster a prosecution case otherwise somewhat tenuous. Uniformly, however, courts have held such references to be misconduct and in a substantial number of cases to be prejudicial error.

Thus, in *People v. Klapperich,* 370 Ill. 588, 19 N. E. 2d 579, the State Attorney's closing argument included

a reference by him to the possibility of the defendant's being put on probation in the event of a verdict of guilty. The Court held:

> "Neither counsel had any right to argue the effect of the verdict of the jury in those cases where the jury has nothing to do with fixing the punishment. In such cases the statutes as to punishment and probation have no relation to the trial of a criminal case. The effect of the argument of the State's Attorney may well have influenced the jury in arriving at a verdict of guilty. The argument was error." (370 Ill. at 593-594.)

In *Davis v. State,* 200 Ind. 88, 161 N. E. 375, the prosecuting attorney urged the jury in his closing remarks to convict the defendant and argued that if the Trial Court believed a mistake had been made it could grant a new trial and that if the Trial Court did not the defendant had the right to appeal the case to the Supreme Court and to the Governor for a pardon. This was held to be error on the ground that it ". . . transcends the bounds of proper argument and is calculated to induce the jury to disregard their responsibility." (200 Ind. at 111.)

See also to the same effect:

People v. Ramirez, 1 Cal. 2d 559, 36 P. 2d 628.

VII.

The Trial Court Committed Reversible Error by Its Hostile Treatment of Petitioners' Counsel, by Its Rulings Prejudicially in Favor of the Government and by Its Interference With the Full Presentation of Petitioners' Defense.

A. The Trial Court Committed Error by Its Hostile Treatment of Petitioner's Counsel.

At a number of points throughout the trial, the Trial Judge treated one of the attorneys for petitioner, Alexander Schullman, with marked asperity and hostility. This treatment was wholly unprovoked by Mr. Schullman, or any other counsel for petitioner, and its total effect must have been to impress the jury that the Trial Judge at the very least regarded petitioners' counsel with less favor than he did counsel for the Government. Some of these interchanges are set forth at this point:

> "Q. Referring to Defendants' Exhibit B for identification, I would like to read the statement which I asked the witness to identify.
>
> The Court: No, I do not want you to read anything not in evidence.
>
> Mr. Schullman: May I be heard?
>
> The Court: No, the ruling will stand.
>
> Mr. Schullman: Well, your Honor, it is important—
>
> The Court (interceding): Are you going to argue against my ruling?
>
> Mr. Schullman: No, but—
>
> The Court: No, I don't want you to argue with me or I will have to take some drastic steps with you.. I will be obliged to do so. I do not want to

do it but I certainly will in a minute. Be quiet—sit down." [Tr. pp. 682-683.]

"Q. Do you know to whom the Clark job had been allocated? A. Mr. Ritter told me that Mr. Jacomini—

Mr. Schullman: Objected to as hearsay.

The Court: I think it would be hearsay.

Mr. Howland: If the court please, if I may suggest, any statement made by Mr. Ritter to his employee based upon the *prima facie* evidence of a conspiracy that has been adduced heretofore, would be admissible in accordance with the well known exception to the hearsay ruling. There is evidence in this record that the first meeting of which we ever heard was in Mr. Ritter's quarters. There is evidence that Mr. Ritter at one time was on the Allocation Committee himself. There is evidence in the record of Mr. Ritter's attendance at other meetings concerning which testimony has been given.

The Court: I recollect that now. Objection overruled. Answer the question.

Mr. Shullman: May I, for the record, since counsel has made a statement on the record in the presence of the jury—

The Court (interceding): I do not want any statements. No. I have ruled.

Mr. Schullman: May I ask permission of the court only for this reason—counsel has made a statement which the jury has heard—

The Court: Request is denied.

Mr. Schullman: I am asking for instructions. Then when counsel for the government makes a statement in the presence of a jury which I think is prejudicial, I cannot answer that, is that your Honor's

position? I am asking for instructions from the court. I will abide by the instructions, but I understand there is a statement made by the government in the presence of the jury which I deem to be prejudicial and inquire when I try to say something —the defendants are presumed to be innocent until the trial is over—I am stopped.

The Court: You are stopped now.

Mr. Schullman: Is that the instruction of the court?

The Court: That is the instruction.

Mr. Schullman: May I state on the record—

The Court: You may sit down. Proceed." [Tr. pp. 764-766.]

"Mr. Schullman: I now move to strike this letter from the record and ask the jury to pay no attention thereto for the following reasons: There is no evidence in the record now by any witness that this letter was ever given to, or mailed to, or received by any defendant.

The Court: Let me ask you a question. This is part of Exhibit 98?

Mr. Schullman: Yes.

The Court: And Exhibit 98 was admitted in evidence?

Mr. Schullman: Yes, Your Honor.

The Court: Therefore the motion to strike will be denied.

Mr. Schullman: May I defend my reasons?

The Court: No. Now please—

Mr. Schullman: Your Honor, I am entitled to under the law—

The Court: We will not proceed any further. The motion is denied.

Mr. Schullman: May I make a motion in the absence of the jury?

The Court: No, sir. Proceed. The motion is denied.

Mr. Schullman: Your Honor, may I ask the court a question?

The Court: No, sir. Sit down, please.

Mr. Schullman: Your Honor, may I be permitted to try this case?

(No response.)" [Tr. pp. 1032-1033.]

Naturally the Trial Judge occupies a position of great influence with the jury and any cue as to his feelings with respect to the conduct and nature of the case is magnified in the average juror's mind far beyond its real importance. The average juror is unfamiliar with legal proceedings, and to him the judge conducting the trial is something in the nature of an Olympian being removed from the partisan approach exhibited by the attorneys, and representing the impartial and all-powerful government. When, therefore, a trial judge demonstrates, as did the Trial Judge in this case, not only an impatience with counsel for one side as against the other, but beyond that, direct and outright hostility, there can be no question but that the jury must have been affected adversely to petitioners. The record can be searched in vain for any similar remarks made to counsel for the United States throughout the trial. A number of hostile utterances, in addition to those cited, are to be found and these taken together with the other examples cited in this Point XII indicate clearly that the trial was not had in the impartial atmosphere to which petitioners were entitled. Naturally the conduct of a trial by a

judge in any but a completely impartial manner renders a conviction reversible.

United States v. Levi, 177 F. 2d 833 (C. C. A. 7, 1949);

Lambert v. United States, 101 F. 2d 960 (C. C. A. 5, 1939);

United States v. Angelo, 153 F. 2d 247 (C. C. A. 3, 1946);

United States v. Andolschek, 142 F. 2d 503 (C. C. A. 2, 1944);

United States v. Minuse, 114 F. 2d 36 (C. C. A. 2, 1940);

Meeks v. United States, 163 F. 2d 598 (C. C. A. 9, 1947).

B. The Trial Court Committed Reversible Error in Rulings Which Exhibited Bias in Favor of the Government.

Throughout the trial the Trial Court seemingly adopted a different standard with respect to rulings on evidence exhibiting a marked bias in favor of the Government and against petitioners. Perhaps the clearest demonstration of this bias is to be found in the rulings with respect to motions to strike certain answers. The Court early in the trial laid down the rule for petitioners that he would not permit an objection to a question or a motion to strike unless it was made before the answer went into the record:

> "Mr. Schullman: May I now make a motion to strike the questions and answers concerning the conversation between this witness and Mr. Swan and between this witness and Mr. Lott or Mr. and Mrs. Lott, on the ground it is not, and cannot be, binding on any defendants involved here?

The Court: Motion denied.

Mr. Schullman: May I interpose additional objection on the ground it is under the hearsay rule?

The Court: The motion comes too late. The questions had been answered.

Mr. Schullman: Is that the only reason for the denial?

The Court: That is one reason.

Mr. Schullman: I purposely withheld objecting because I wanted him to finish his inquiry.

The Court: The ruling will stand. Unless objections are properly made to questions the answers will not be stricken. In other words, we do not want to sit and listen to answers and then entertain motions to strike later." [Tr. p. 535.]

A few days later, however, the Court applied quite a different standard when it was the Government which was seeking to have answers stricken from the record. Indeed, in the following interchange it will be noticed that the Court *on its own initiative* struck answers from the record even without a motion on the part of the government:

"Q. I will ask you whether or not, Mr. McDonald, during the period which is the latter part of the year 1950, wherein Mr. Alsup conducted certain activities with reference to the race track, negotiating contracts with the various master pumbers and plumbing contractors of Las Vegas, Nevada, negotiating wage and labor agreements, whether or not in all of those matters which transpired during that period he was authorized by the Executive Board of the local to take any such action? A. Yes.

Mr. Howland: I will object to that.

The Court: The answer may go out. Objection will be sustained. The answer will be stricken.

Q. Is it necessary, Mr. McDonald, that Mr. Alsup, as business agent, must report from time to time upon all activities taken by him as business agent to the Executive Board, the local? A. Yes, sir.

Mr. Howland: I will object to that, if the court please.

The Court: The answer will be stricken. Objection will be sustained." [Tr. pp. 1089-1090.]

C. The Trial Court Committed Reversible Error in Permitting Government Counsel to Make Statements in the Presence of the Jury With Respect to Their Theory of the Case While Hampering and Limiting the Same Conduct by Petitioner's Counsel.

At a number of points in the trial government counsel were permitted to make statements in the presence of the jury which set forth the theory of the prosecution. When petitioners' counsel sought to counter the effect which this must have had upon the jury by a statement of petitioners' theory of the case, they were summarily cut off. When combined with the conduct of the Court set forth in the subdivisions immediately preceding this, the jury could not have helped but be influenced in their deliberations by the prejudicial attitude so clearly shown.

In the interchange cited directly below, perhaps the most important issue in the entire trial was commented upon unfavorably to petitioners by the Trial Judge. As indicated by the briefs on appeal, there is a substantial difference between petitioners' and the government's views of what constitutes interestate commerce for purposes of jurisdiction under the Sherman Act. In the quoted por-

tion it will be noted that, whereas the government's position is set forth at length, petitioners were not permitted to set forth their understanding of this issue or their position with respect to it:

"Mr. Howland: We object to this entire cross-examination. The indictment, if the court please, the indictment itself alleges and the government must approve, that these contractors bought these materials and installed them. Now we have to stop somewhere in a case of this complexity and magnitude and we have subpoenaed these suppliers to establish their general course of dealing with some companies by the volume of the business flowing across the State line into the State of Nevada. Now counsel by this line of questioning is endeavoring, I submit, to establish from these witnesses a negative fact, for which the government did not subpoena witnesses, concerning which they were not interrogated on direct examination and it is outside the scope of the purpose for which the government subpoenaed the corporation which employed this gentleman and upon which he was interrogated upon direct.

The Court: I notice this witness and all other witnesses who testified to similar facts, have testified that they had no knowledge of what became of the articles after they were shipped. I do not think there is any use arguing; the question has been answered.

Mr. Schullman: May I state with equal—

The Court (interceding): No, let it stand the way it is. We have heard each one of these witnesses testify he had no knowledge other than what was shown by the records and the records do not show what was done with any of these articles or

supplies after they left his establishment. I think it appears this witness does not know, and does not pretend to know, what became of it. The objection will be sustained.

Mr. Schullman: Your Honor, may I ask permission to now state—

The Court (interceding): No I would rather not have any statements.

Mr. Schullman: I think we are entitled to show our side of the case, Your Honor. May I have some statement on the side with counsel? I merely want to show a statement made by the government's attorney, which indicates we have no right to show our side of the case. I want merely to show that we do have a right.

The Court: Proceed. There is nothing before the Court now." [Tr. pp. 424-426.]

An interchange between Court and counsel which had the same import as that cited above has already been quoted at page 70 of this brief in which the Court in effect adopted the theory of the case set forth by the prosecution and not only rejected the defense's theory but even denied the right to present that theory to the jury in a manner similar to that which had just been utilized by the prosecution.

An interchange of a somewhat different character, quoted below, indicates that at an early point in the trial the Court not only had adopted the theory of the prosecution with respect to the nature of interstate commerce but in effect ridiculed the position taken by petitioners with respect to this issue. As indicated by the preceding

portions of this brief, it is on this appeal, and was at the time of trial, petitioners' contention that in order to justify a finding that petitioners were engaged in interstate commerce, it is necessary that there be substantial evidence showing a continuous flow of commodities across state lines to the ultimate user, and that the alleged acts of petitioners had a substantial and direct effect upon this continuous flow. It was the government's position at the time of trial that a sufficient showing on the issue of interstate commerce could be made by introducing documentary evidence and testimony to prove that petitioners had purchased goods across state lines, and had subsequently installed these goods within the State of Nevada without regard to the length of time elapsing between the purchase and the installation and without regard to any difference in form with respect to these goods.

Pursuant to this theory held by the prosecution, therefore, the government's *prima facie* case with respect to interstate commence consisted largely of witnesses and documents designed to prove that petitioners had purchased a great majority of their plumbing and heating supplies outside of the State of Nevada. Consistent with their conception of interstate commerce on the other hand, petitioners' counsel at the trial sought to demonstrate to the jury that these goods, while purchased initially from outside the State of Nevada, had come to rest for long periods of time on the shelves either of petitioners or of wholesalers within the State of Nevada;

that in an inconsequential number of cases were the goods shipped directly to the job site; and that, in any event, the goods as finally installed were fabricated and changed substantially from their form upon importation from outside the state.

The Trial Judge made the following disparaging remarks with respect to petitioners' theory of interstate commerce as they sought to show it at the trial.

> "The Court: I think counsel can stipulate to that. I think all these witnesses have testified, these gentlemen who brought these records in here, that all they knew about any of this material was what was disclosed by the records and the records do not disclose what was done with the material, so why should we ask the question because if you are permitted to ask, you can ask it of every witness and get the same answer. Isn't it obvious the custodian of these records doesn't know what became of the material? I think it would be admitted that this witness does not know what became of any of this material after it left the establishment.
>
> Mr. Schullman: And we have, of course, asked for the exclusion of the documents and evidence, and of course they were admitted and I think this testimoney—
>
> The Court (interceding): Why burden the record when this witness doesn't know anything about what was done with any of these materials? I think it is true, Mr. Howland, that, so far as the examination of all these witnesses who have come from these different wholesale houses, they have indicated that all they know is what is contained in the record.' [Tr. pp. 427-428.]

VIII.

The Trial Court Committed Reversible Error in Denying Petitioners' Motion for New Trial Upon Newly Discovered Evidence.

The trial before the District Court in the above matter was completely terminated, sentence imposed and Notice of Appeal effecuated on November 8, 1951.

On or about July 18, 1952, in behalf of petitioners in this matter, a Motion for New Trial Upon Newly Discovered Evidence was filed with the District Court and hearing thereon was set for October 7, 1952. On that day, his Honor Roger Foley, Judge of the United States District Court, for the District of Nevada, denied the Motion for New Trial Upon Newly Discovered Evidence and thereupon petitioners filed a Supplemental Designation of Record, so that all pleadings and proceedings in respect to such Motion for New Trial are part of this appeal.

In support of the Motion for New Trial, there was filed in the District Court the Affidavit of John W. Bonner, Counsel for Ralph Alsup, together with the Affidavit of Richard Richards, one of Counsel for the remaining petitioners.

The Affidavit of John W. Bonner set forth the nature of the newly discovered evidence. This was clearly set forth in said Affidavit and the Exhibits A to J, inclusive, attached thereto. The exhibits were criminal complaints against certain officials of the Las Vegas Thoroughbred Racing Association, the date of filing ranging from November 21 to November 24, 1951; and in addition, there was set forth a copy of the petition of the bankruptcy

proceedings filed by the stockholders of the Las Vegas Thoroughbred Racing Association on *March 25, 1952.*

The Affidavit of Richard Richards analyzed the testimony at the trial and set forth the basis for the granting of the new trial by the Court. In essence, said Affidavit and the Points and Authorities in Support of the Motion for New Trial filed concurrently with said Affidavit, established that thirteen witnesses during the trial had testified at considerable length concerning the race track, and that their testimony covered approximately two hundred thirty pages of testimony.

It was and is contended by petitioners that all of said testimony (compounded by additional arguments by Counsel at the trial in respect to the race track) raised strong and erroneous conclusions in the minds of the jury deciding the fate of the petitioners in this case.

The Affidavit of Richard Richards, in urging the granting of the new trial, exhibited the blocking by the Court or by Government Counsel of the attempts made by Counsel for petitioners to clarify the issues respecting the race track.

It was and is the contention of the petitioners that the injection at great length of this race track issue and the erroneous conclusions and inferences raised by the Government that the inability to complete the plumbing jobs thereon, and the long shut-down of work on the race track, were due exclusively to the fault or on account of the petitioners by reason of the alleged conspiracy, was highly prejudicial. It was urged and suggested by such testimony of the witnesses who discussed the race track, and Government Counsel's examination of them, that a strike was caused by the plumbers purportedly in

pursuance of the alleged conspiracy and, as a result, work was shut down.

Examples, as set forth in said Affidavit of Richard Richards, concerning such testimony are as follows:

(a) Mr. Burns, a Government witness [commencing Tr. p. 875], was entirely concerned with the race track and the issues connected therewith. During cross-examination of Mr. Burns, the alleged strike of labor at the race track was discussed and the inference was presented to the jury that the strike was due to or in connection with alleged machinations of the petitioners then on trial.

Mr. Schullman asked [Tr. p. 898]: "Isn't it a fact that the race track ran into difficulties with money?" The answer given was negative in effect, and emphasis was again placed upon the strike and inferences again drawn adverse to petitioners.

(b) Mr. Schullman again attempted to bring out the fact of the then existing difficulties with the S. E. C. [Tr. p. 899.] This was objected to by Government Counsel and the Court sustained the objection, effectively blocking any testimony or information reaching the jury on this subject.

(c) Again, in respect to the testimony of Mr. Burns, Government Counsel on direct examination went deeply into the problems and inferences involving the race track, and asked [Tr. p. 886]: "Did there come a time when the entire race track job was shut down by a strike?"

Thus, the Government was able to establish a clear inference, even though in error, as it appears upon

the newly discovered evidence, that there was a connection between the alleged strike and the activity of petitioners.

It appears, therefore, that the petitioners have specific evidence which would be offered at a new trial. The difficulties confronting the construction and operation of the race track were difficulties caused by a lack of funds and by the machinations of certain individuals in no way connected with the petitioners herein. Such newly discovered evidence corroborates the position of the petitioners taken or attempted to be taken at the trial, and presents new and definite evidence on the overall subject, of which the jury should have the benefit in order to determine the essential issue of reasonable doubt concerning the alleged guilt of petitioners herein—it being the position of the petitioners that with such evidence before them, the jury would reach a decision of acquittal in this case.

(d) Again [Tr. p. 1001], in the course of the examination of Mr. Sylvester, a Government witness, Mr. Schullman made an offer of proof in which he pointed out the then current indefinite and vague status of the record in regard to the important matters being discussed and involving the race track issue and the status of the stockholders, and requested that the defendants be permitted to go into all the facts relating to the race track. This offer of proof was rejected.

It is urged that the factual and legal essentials requisite to the granting of a new trial on newly discovered evidence were presented to the Trial Court on petitioners'

Motion for New Trial, and the Trial Court should have granted the same.

It is clear that:

1. The evidence offered in the Motion for New Trial was actually newly discovered evidence and was unknown to Defendants at the time of the trial. This is clearly set forth in the Affidavit of John W. Bonner and the Exhibits A to J, inclusive, attached thereto, all of which occurred after the conclusion of the case in the District Court. The criminal complaints referred to in said Affidavit of John W. Bonner range from November 21, to 24, 1951, and the bankruptcy proceedings [Ex. J. of said Affidavit] was not filed *until March 25, 1952.*

Accordingly, the first requisite for the granting of such a Motion has been complied with.

Fogel v. United States, 167 F. 2d 763 (C. C. A. 5, 1948);

United States v. Johnson, 142 F. 2d 588 (C. C. A. 7, 1944);

Paddy v. United States, 143 F. 2d 847 (C. C. A. 9, 1944).

2. The evidence proffered, as set forth in the Affidavits of John W. Bonner and Richard Richards, was not merely cumulative or impeaching, but was material and basic, since the presentation of such testimony on a new trial would have caused the jury to arrive at the only possible conclusion, and that is, that there was no conspiracy to violate the Sherman Antitrust Act. As the trial was actually conducted, however, the evidence, in bulk, proffered by the Government related to the race

track, and without this newly discovered evidence the jury could conclude and did conclude that the alleged conspiracy must have existed and did prevent the completion of the plumbing jobs on the race track.

It is our contention that the newly discovered evidence is so material that it would *probably produce* a different verdict if a new trial were granted, because certainly the entire complexion and bases of the Government's case as a whole would be changed.

3. Such newly discovered evidence would probably produce an acquittal.

United States v. Colangelo, 27 Fed. Supp. 921;
Arbuckle v. United States, 146 F. 2d 657.

More importantly, such evidence would probably require the District Court on a Motion for Judgment of Acquittal to grant the same.

The rule of law, followed in this Circuit in respect to the elements required upon considering a Motion for Directed Verdict of Acquittal, is that enunciated in

Curley v. United States, 160 F. 2d 229 (1947), cert. den. 331 U. S. 837.

To the same effect, see:

United States v. Gardner, 171 F. 2d 753 (C. C. A. 7, 1948);

United States v. Central Supply Assn., 6 F. R. D. 526 (D. C., N. D. Ohio, 1947);

United States v. Cole, 90 Fed. Supp. 147 (1950).

These cases have adopted the rule as enunciated in the *Curley* case in which the Court stated:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty." (160 F. 2d at pp. 232-233.)

It is seriously submitted in this case that the newly discovered evidence if presented either to the jury or the judge, particularly since the case depends upon circumstantial evidence, would result in an acquittal.

4. The failure to learn of the evidence was due to no lack of diligence on the part of petitioners.

This is apparent from what has been said before, since the criminal charges and the bankruptcy proceedings were subsequent to the conclusion of the trial.

Coates v. United States, 174 F. 2d 959.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALEXANDER H. SCHULLMAN,

RICHARD RICHARDS,

DAVID ZENOFF,

By ALEXANDER H. SCHULLMAN,

Counsel for Petitioners.

Dated: May 12, 1954.

Office - Supreme Court, U.
FILED
MAY 20 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted]84

RALPH ALSUP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. .....

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TO: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

YOUR PETITIONER RESPECTFULLY SHOWS:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, along with 11 other defendants, 10 of whom were convicted and one acquitted, upon his Motion for Acquittal, were tried before a jury in the Federal District Court, District of Nevada, at Carson City, Nevada; said trial commenced on October 1, 1951 and continued until October 17, 1951.

Petitioner moved for a dismissal of the indictment prior to the trial which was denied (R. 14); petitioner moved for acquittal at close of Government's case; which was denied (R. 56); and at close of all the evidence (R. 58); also for arrest of judgment (R. 152); and for new trial (R. 153).

Petitioner thereupon appealed to the United States Court of Appeals for the Ninth Circuit, which Court affirmed the lower Court: (See 210 F. 2d — No. 4, 732. Rehearing denied March 22, 1954.)

Petitioner and said co-defendants were charged in an indictment with violation of Sherman Act, title 15 USC Sec. 1, conspiracy to fix prices in Southern Nevada area, in plumbing and heating industry (R. 3). Petitioner was business agent of Local Plumbers Union. All other defendants were plumbing contractors.

Petitioner appealed in a separate appeal to said Ninth Circuit Court and the same procedure is followed herein.

JURISDICTIONAL STATEMENT

The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28 U.S.C. 1254-1.

The cases believed to sustain the jurisdiction of this Court are:

Braverman v. U.S., 317 U.S. 49, 87 L.Ed. 23, 63 Sup. Ct. 99;

Miller v. U.S., 317 U.S. 192, 87 L.Ed. 179, 63 Sup. Ct. 438;

Goldstein v. U.S., 316 U.S. 114, 86 L.Ed. 1312, 62 Sup. Ct. 1000.

The said Ninth Circuit Court of Appeals decided federal questions herein in a way probably in conflict with applicable decisions of this Court; that the said decision is in conflict with decisions from other Circuit Courts.

The petition for rehearing the judgment sought to be revised herein from said Circuit Court was denied March 21, 1954; and the date of this application for certiorari is May 15, 1954. This court granted petitioner an extension of time to May 21, 1954 to file this petition.

QUESTIONS PRESENTED

The questions herein presented and which were presented in the Ninth Circuit Court of Appeals are: (R. 1360)

I.

The indictment fails to allege facts sufficient to constitute an offense under the laws of the United States.

II.

The trial court was without jurisdiction to pronounce judgment and sentence; and that the court erred in so pronouncing judgment and sentence as to Ralph Alsup, Defendant and Appellant.

III.

The trial court was without jurisdiction to pronounce Dismiss said indictment.

IV.

The trial court erred in overruling the objections of Counsel for Appellant to the admission of certain testimony and

exhibits given and introduced in behalf of Appellee, which testimony and exhibits were inadmissible under the specific objections set forth in the Reporter's Transcript.

V.

The trial court erred in excluding certain testimony and exhibits offered and introduced by Counsel for Appellant, and erred in sustaining the objections thereto made by Counsel for Appellee, which testimony and exhibits were admissible under the specific bases set forth by Counsel for Appellant in the Reporter's Transcript.

VI.

The evidence was insufficient to establish the offense, and the trial court erred in denying Appellant's Motions for Judgment of Acquittal at close of Government's evidence.

VII.

The Court erred in denying said appellant's motion for acquittal at close of all the evidence.

VIII.

The trial court erred in failing to admonish the jury concerning the prejudicial remarks and statements made by Government Counsel in his address to the jury, and objected and excepted to by Counsel for Appellant.

IX.

The trial court erred in denying Counsel for other Appellants the right to make objections on the record and the right to make statements or arguments in support of such objections; and the trial court further erred in ad-

monishing Counsel for other Appellants in the presence of the jury, thereby depriving Appellant, Ralph Alsup, of a fair and impartial trial.

X.

The trial court erred in failing to give certain instructions to the jury as requested by the Appellant.

XI.

The trial court erred in giving certain instructions to the jury to which the Appellant duly excepted.

XII.

The trial court erred in weighting its instructions in favor of the Appellee or Government and in favor of a verdict of guilty, all of which was prejudicial to Appellant.

XIII.

The verdict of guilty herein was inconsistent with the evidence and not supported by the evidence.

XIV.

The court erred in overruling Appellant's Motion in Arrest of Judgment.

XV.

The court erred in overruling Appellant's Motion for a New Trial.

XVI.

The evidence disclosed that said Appellant, Ralph Alsup, was immune from prosecution pursuant to title 15 U.S.C.A. 17.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of said Court of Appeals is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

2. The decision of said Court of Appeals is in conflict with decisions from other Circuit Courts of Appeal on the same matter.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Ninth Circuit Court of Appeals in the case numbered and entitled on its Docket No. 13,218, Las Vegas Merchant Plumbers Association, Merchant Plumbers Exchange, Inc., A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie, Bernard V. Provenzano and Ralph Alsup, Appellants, vs. United States of America, Appellee.

DATED, May 15th, 1954.

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IN THE

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OCTOBER TERM, 1953

No. .....

RALPH ALSUP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF APPELLANT

OFFICIAL REPORT OF OPINIONS BELOW

The proceedings in the District Court of the District of Nevada appear in the record herein as follows:

Verdict (R. 146)

Judgment and Committment (R. 175)

I.

The opinion on appeal to Ninth Circuit is reported in 210 F 2d No. 4, 732. Rehearing denied March 22, 1954.

II.

JURISDICTION

Jurisdiction of this Court is invoked under title 28, Section 1254-1 USC.

III.

STATEMENT OF THE CASE

The plaintiff in this case contends that petitioner, Ralph Alsup, as business representative and financial secretary of Local No. 525, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, entered into an unlawful agreement and conspiracy contrary to the provisions of Title 15 U.S.C. 1, with two associations of plumbing contractors and various plumbing contractors (R. 3) in Southern Nevada to suppress competition and fix prices by having a common estimator to estimate all jobs submitted to said defendants and an allocation committee to allocate each contract to certain contractors and wherein all other contractors, other than the one designated, would submit higher or fictitious bids so that all competition between said defendants would be eliminated and the price as figured by the common estimator would in each instance be the final contract price.

Appellant, Alsup, would allegedly refuse to furnish men to those contractors to which said jobs were allocated.

A motion to dismiss the indictment was made upon the ground same did not contain facts sufficient to constitute a public offense which motion was denied (R. 14).

Plaintiff produced numerous wholesale dealers in plumbing and heating fixtures wherein evidence of sales of such supplies into Southern Nevada from wholesalers in other states and Nevada was introduced.

Petitioners contended that such evidence is insufficient to establish an offense in interstate commerce. This point

is raised in the motions for acquittal and in arrest of judgment, in the insufficiency of such evidence to sustain the verdict and the motion for a new trial. (R. 1360-1363.)

The record herein contains evidence wherein appellant, Alsup, performed certain acts as business agent of the said plumbers local which plaintiff contends was in furtherance of the alleged conspiracy but which we contend were bona fide activities performed in the interest of the union and not in furtherance of any unlawful agreement or conspiracy. We contend that appellant, Alsup, is immune from prosecution by virtue of 15 U.S.C. 17, in that any such acts performed by him were solely in the interest of the union. This point was raised in the motion for dismissal, (R. 14) the motion for judgment of acquittal at close of plaintiff's evidence, (R. 53) the motion for judgment of acquittal at close of all evidence, (R. 1315) and in specification of errors No. XIII (R. 1362) and in the motion for a new trial. (R. 153).

The record contains evidence of numerous contracts wherein bids were submitted to the various defendants and other contractors, some of which were based on estimates prepared by the common estimator, Jack Swan, and some by the contractors, the letting of contracts pursuant to such bids, the plaintiff contending that some of such contracts were allocated to certain contractors by an allocation committee and that other contractors pursuant to the alleged unlawful agreement refused to submit competitive bids, but on the contrary submitted higher or fictitious so that there was no competitive bidding.

It was admitted by defendants' principal witness, B. V. Provenzano, (R. 1146 et seq.) that Jack Swan had been engaged to prepare estimates but that the use of such estimates were entirely voluntary on the part of the con-

tractors and that such contractors were not required to follow such estimates except as a guide and that same could be adjusted in accordance with the desire of each contractor using such estimates.

A great deal of testimony was introduced by witnesses of plaintiff and defendants regarding plumbing contract of Las Vegas Race Track. Plaintiff contends that Mr. Alsup refused to furnish union men to Mr. Sylvester, the final successful bidder, because Mr. Provenzano did not get the job, while we contend that any failure to furnish men was because of a bona fide labor dispute existing between the general contractor, McNeil Contracting Co., and the union.

Certain testimony of plaintiff's witnesses was objected to and overruled by the Court. Such testimony objection and ruling is particularly set forth in the argument herein.

Certain instructions were offered by petitioners herein (R. 59) and were refused by the Court (R. 1327) and objections made.

Upon the instructions given by the Court (R. 111) objections were made as appears in page 1321 et seq. of the record.

Motions in arrest of judgment (R. 152) and for a new trial (R. 152) were made by petitioner, Ralph Alsup, both of which were denied. Error is claimed in such rulings. (R. 1360).

IV.

SPECIFICATIONS OF ERRORS (R. 1360)

1. The indictment fails to allege facts sufficient to constitute an offense under the laws of the United States.

2. The trial court was without jurisdiction to pronounce judgment and sentence; and that the court erred in so pronouncing judgment and sentence as to Ralph Alsup, Defendant and Appellant.

3. The trial court erred in overruling Appellant's Motions to Dismiss said indictment.

4. The trial court erred in overruling the objections of Counsel for Appellant to the admission of certain testimony and exhibits given and introduced in behalf of Appellee, which testimony and exhibits were inadmissible under the specific objections set forth in the Reporter's Transcript.

5. The trial court erred in excluding certain testimony and exhibits offered and introduced by Counsel for Appellant, and erred in sustaining the objections thereto made by Counsel for Appellee, which testimony and exhibits were admissible under the specific bases set forth by Counsel for Appellant in the Reporter's Transcript.

6. The evidence was insufficient to establish the offense, and the trial court erred in denying Appellant's Motions for Judgment of Acquittal at close of Government's evidence.

7. The Court erred in denying said Appellant's motion for acquittal at close of all the evidence.

8. The trial court erred in failing to admonish the jury concerning the prejudicial remarks and statements made by Government Counsel in his address to the jury, and objected and excepted to by Counsel for Appellant.

9. The trial court erred in denying Counsel for other Appellants the right to make objections on the record and the right to make statements or arguments in support of

such objections; and the trial court further erred in admonishing Counsel for other Appellants in the presence of the jury, thereby depriving Appellant, Ralph Alsup, of a fair and impartial trial.

10. The trial court erred in failing to give certain instructions to the jury as requested by the Appellant.

11. The trial court erred in giving certain instructions to the jury to which the Appellant duly excepted.

12. The trial court erred in weighting its instructions in favor of the Appellee or Government and in favor of a verdict of guilty, all of which was prejudicial to Appellant.

13. The verdict of guilty herein was inconsistent with the evidence and not supported by the evidence.

14. The court erred in overruling Appellant's Motion in Arrest of Judgment.

15. The court erred in overruling Appellant's Motion for a New Trial.

16. The evidence disclosed that said Appellant, Ralph Alsup, was immune from prosecution pursuant to title 15 U.S.C.A. 17.

V.

ARGUMENT

I.

THE INDICTMENT FAILS TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE UNDER THE LAWS OF THE UNITED STATES.

The only portions of the indictment referring to Appellant herein, Ralph Alsup, appear in para. 7 (R. 6) and para. 19 (f) (R. 11) which provide as follows:

7. Ralph Alsup, a resident of Las Vegas, Nevada, is hereby indicted and made a defendant herein. During the period of time covered by this indictment, the said defendant has been and now is employed by and has acted in the capacity of business representative and financial secretary of Local No. 525, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

19. (f). That in order to enforce compliance with and adherence to said plan to fix prices and allocate bids among plumbing contractors, defendant Ralph Alsup would induce qualified journeymen and apprentice plumbers and pipefitters not to work in any job for any plumbing contractor other than the one designated as aforesaid to submit the lowest estimate or bid thereon.

Title 15 U.S.C. 17, provides as follows:

> The labor of a human being is not a commodity of article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restrain of trade, under the anti-trust laws.

The indictment must contain allegations showing that

the description and acts alleged against said Appellant, Alsup, were not performed in the interest and for the benefit of the union which he represented.

Apex Hosiery Co. vs. Leader, (1940) 310 U.S. 469, 60 S. Ct. 962, 84 L.Ed. 1311, 128. A.L.R. 1044.

Allen Bradley Co. vs. Local Union No. 3 (1945) 325 U. S. 797-821, 89 L.Ed. 1939.

New Negro Alliance et al. vs. Sanitary Grocery Co. 303 U.S. 522, 664, 82 L.Ed. 1013.

United States vs. Bay Area Painters and Decorators and Dec. Joint Comm. 49 Fed. Supp. 733.

United States vs. American Federation of Musicians, D.C. N.D. E.D. Ill. 47 Fed. Supp. 304, affirmed 63 S. Ct. 665.

United States vs. Carozzo, 37 F. Supp. 191-196, affirmed U.S. Sup. Ct. 313 U.S. 539, 61 S. Ct. 839, 85 L.Ed. 1508.

United States vs. San Francisco Elec. Contractors' Assn. 57 Fed. Supp. 57.

Peterson vs. Master Plumbers' Assn. 44 Fed Supp. 908 (Nev.).

Motion to dismiss made in District Court and denied. (R. 14).

II.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO PRONOUNCE JUDGMENT AND SENTENCE; AND THAT THE

COURT ERRED IN SO PRONOUNCING JUDGMENT AND SENTENCE AS TO RALPH ALSUP, DEFENDANT AND APPELLANT.

By agreement with counsel for all other petitioners and in order to avoid repetition in the briefs herein or to belabor the argument presented herein unnecessarily this point is being exhaustively presented in the brief of all other petitioners and petitioner herein relies upon the authorities presented by the other petitioners herein upon this specification of error; in addition we rely upon cases cited under our first specification of error herein.

III.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS SAID INDICTMENT.

This specification is covered by authorities and statement following specifications I and II supra.

IV.

THE TRIAL COURT ERRED IN OVERRULING THE OBJECTIONS OF COUNSEL FOR APPELLANT TO THE ADMISSION OF CERTAIN TESTIMONY AND EXHIBITS GIVEN AND INTRODUCED IN BEHALF OF APPELLEE, WHICH TESTIMONY AND EXHIBITS WERE INADMISSIBLE UNDER THE SPECIFIC OBJECTIONS SET FORTH IN THE REPORTER'S TRANSCRIPT.

On pages 923-924 of the Record herein the following proceedings transpired:

> Testimony of Emile R. Hansen:
>
> Q. And did you have a conversation with Mr. Swan that evening on the subject of the race track project?

A. Yes, but the strike was just called two or three hours prior.

Q. What was the conversation you had with him?
Mr. Richards: For the record, we object on the grounds it is hearsay and no proper foundation for asking this question in this case, and not binding upon any of the defendants.
The Court: Objection will be overruled. The witness may answer the question.

A. Well, he told me that he heard the race track job was pulled, a strike on the race track, and he asked me if I knew why. I told him I did not know. So we had a few drinks and we talked about it. He said, "I think I can settle that strike by morning if we can come to terms." In other words, his proposition was that we give the O. K. Plumbing the contract on the job, which our company had no control over. It is let direct by the Racing Association. And he told me to contact my head office and he would call me the next morning.

Q. And you say he told you to contact your office?

A. Yes.

Q. What for?

A. Give them the proposition.

Mr. Bonner: I move that be stricken for an objection, that it is not binding on any defendants here, as Mr. Swan is not one of the defendants. Any statements he would make would not be binding on any of the present defendants.

The Court: The motion is denied.

This testimony was purely hearsay made without the presence of any defendant herein and upon a matter which was not only no part of the alleged conspiracy nor tending to prove such conspiracy but upon a matter completely irrelevant to such alleged conspiracy. Neither party to the conversation was a co-conspirator nor authorized by any defendant to make any of the alleged statements.

This testimony was particularly prejudicial to appellants herein in that it purported to show that the strike was called to enforce the race track officials to give Provenzano the contract. The evidence clearly shows that the strike had absolutely nothing to do with the plumbing contractors or the plumbers' union but was a controversy over carpenters.

The evidence was clearly inadmissible.

Krulevitch v. U.S. (N.Y. 1949) 69 S. Ct. 716,
336 U.S. 440, 93 L.Ed. 790.

On page 969-970, Record, in examining T. O. Anderson, the following appears:

Q. What was the conversation between Mr. Hansen and Mr. Swan which you heard?

Mr. Richards: Objection to on the grounds of hearsay, outside the scope of this case, no bearing on the defendants herein.

The Court: Objection overruled. Answer the question.

See discussion above.

V.

THE TRIAL COURT ERRED IN EXCLUDING CERTAIN TESTIMONY AND EXHIBITS OFFERED AND INTRODUCED BY COUNSEL FOR APPELLANT, AND ERRED IN SUSTAINING THE OBJECTIONS THERETO MADE BY COUNSEL FOR APPELLEE, WHICH TESTIMONY AND EXHIBITS WERE ADMISSIBLE UNDER SPECIFIC BASES SET FORTH BY COUNSEL FOR APPELLANT IN THE REPORTER'S TRANSCRIPT.

Authorities cited by other petitioners upon this specification will be relied upon.

VI.

EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSE, AND THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AT CLOSE OF GOVERNMENT'S EVIDENCE.

The summary of the evidence appears herein under the heading "Statement of the Case." The principal authorities involving interstate commerce are being presented by other petitioners in their briefs; that appellant, Ralph Alsup, relies upon such authorities in addition to the authorities hereinafter cited.

There is no evidence to the effect that Mr. Alsup entered into any agreement with the plumbing contractors or any of them, to assist in or to participate in any plan or scheme to prevent competition in bidding or in the estimation of and/or the allocation of jobs or contracts between the variout plumbing contractors. The only meeting of the association or exchange or of the contractors wherein the evidence discloses that plumbing contractors discussed their

problems other than problems on wages, hours and working conditions was the meeting early in August which was first referred to by Mr. Bates. (R. 517 et. seq.). He testified that at the meeting in August 1950 attended by Alsup and certain plumbing contractors the form of organization, the formation of a central estimating bureau, to do estimating, which estimates would be the price charged, that two percent would be charged to defray expenses, that labor would be estimated at the rate of a day to a fixture or a day and a quarter to a fixture. (R. 521-522).

Mr. Provenzano testified (R. 1156) that a meeting was held about the middle of August, 1950, which was called for the purpose of signing the labor contract. (Ex. 48). That Mr. Alsup was present and as soon as the contract was signed Alsup left, whereupon a general discussion by the contractors followed. (R. 1156).

There is no evidence of Alsup attending any other meetings with the contractors, or any or either of them, or of any agreement, concert or conspiracy to suppress competition or fix prices or any other matter except labor matters. It must be presumed from the evidence that Mr. Bates and Mr. Provenzano referred to the same meeting as there is no evidence of Alsup having attended any other meeting.

Thus, there is absolutely no evidence of Alsup having entered into an unlawful agreement.

In addition, any activities of Mr. Alsup clearly came within the immunization provisions of title 15 U.S.C. 17, supra.

The testimony wherein Mr. Alsup came to the Ritter shop in October, 1950, (R. 755 et seq.) (R. 935 et seq.) does not

establish that he had entered into any such agreement or conspiracy; the record shows that the date of this incident was on or about October 26, 1950. (R. 864). Ex. 48 in evidence provides in Article III that the working day shall be from 8:00 A.M. to 5:00 P.M.; the union's minutes of July 14, 1950, (R. 1086) provide that all shops will go to work at 7:00 A.M. until Sept. 16, 1950. Thus, according to the record herein, Ritter was in violation of the agreement when Alsup appeared and stopped the men for a short period; the only evidence of the reason for such action is the statement testified to by Mr. Forgeron (R. 75) attributed to Alsup wherein Alsup said: "Are you going along with this master plumber program or not? If you are not I am taking the men out of my shop." And, substantially the same testimony from J. M. Ritter. (R. 936). While the plaintiff sought to attribute Alsup's actions to Ritter's having bid on the Ward and Ward job (R. 936) by inference there is no testimony from which a reasonable inference could be drawn from Mr. Alsup's actions at said time and place that Ritter's bid on the Ward and Ward job had any connection with Alsup's actions.

The plaintiff then sought to prove Alsup's participation in the alleged unlawful agreement and conspiracy through testimony relative to Las Vegas Race Track. Mr. Sylvester testified as to Alsup's refusal to furnish men. (R. 971 et seq.). A study of this testimony will clearly disclose that such refusal was entirely the result of a bona fide labor dispute existent between Local 525 and McNeil Contracting Co. having nothing whatsoever to do with the Las Vegas Merchant Plumbers Assn. or any of its members. Such testimony further shows that as soon as such dispute was settled and ever since Mr. Sylvester has been furnished all the men required. (R. 1014).

Mr. Alsup suffered severe prejudice in being jointly tried with the numerous defendants herein in that with the exception of outline of evidence hereinabove set forth all other evidence introduced through the numerous witnesses for the plaintiff was evidence, the greater part of which would have been inadmissible against Alsup individually and constituted prejudicial error against him.

U. S. v. Central Supply Assn. (1947) 6 Fed. Rules Dec. 526.

The evidence produced required an acquittal of Mr. Alsup pursuant to immunization granted labor union officials acting in the interest of the union membership.

Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 S. Ct. 982, 84 L.Ed. 1311, 128 A.L.R., 1044 (1940);

U. S. v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L.Ed. 788 (1941);

Allen Bradley Co. v. International Brotherhood of Electrical Workers, 325 U.S. 797, 65 S. Ct. 1533, 89 L.Ed. 1919 (1945).

Barker Painting Co. v. Brotherhood of Painters, 57, App. D.C. 322, 23 F (2d) 743, cert. den. 276 U.S. 631, 72 L.Ed. 741, 48 S.C.R. 324.

U. S. v. Patterson, 55 Fed. 605 (CC Mass.).

Monroe v. Colored Screwmen's Benev. Assn. 135 L.A. 893, 66 So. 260.

Marsel v. Sigman, 123 Misc. 714, 205 N.Y.S. 807.

Meier & Pohlmann Furn. Co. v. Gibbons et al.,
113 F. Supp. 409.

THE COURT ERRED IN DENYING SAID APPELLANT'S MOTION FOR ACQUITTAL AT CLOSE OF ALL THE EVIDENCE.

If there was any doubt regarding Mr. Alsup's activities in interest of labor union and not in furtherance of alleged conspiracy, such doubt should certainly have been resolved in his favor after the testimony of Provenzano (R. 1146 et seq.), Scott (R. 1083 et seq.) and McDonald (R. 1087 et seq.) was heard. Cases cited pursuant to specification No. 6 herein are relied on, also the following:

The test defined by Justice Holmes wherein "A conspiracy is a partnership in criminal purposes" was held in the case of U. S. v. Kissel, 218 U.S. 601, 31 S. Ct. 124, 54 L.Ed. 1168 to be the question as to whether or not a conspiracy existed. This element is entirely lacking insofar as Alsup is concerned.

The applicable rule relative to the degree of proof necessary to warrant a conviction under Section 1 of the Sherman Act is as follows:

> "In order to justify a jury in finding a verdict of guilty based entirely upon circumstantial evidence, the facts must not only be consistent with the guilt of the defendants, and each of the defendants, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence. Stated another way, not only must each

fact relied upon to show guilt be proved beyond a reasonable doubt, but such fact must be consistent with all other facts introduced in a chain of circumstances and such facts must further be inconsistent with any other rational conclusion than that of guilt of the defendants."

Pevely Dairy Co. v. United States, 178 F. (2nd) 363, 367.

See also U. S. v. San Francisco Electrical Contractors Assn., 57 Fed. Supp. 57.

There is no direct evidence against Alsup, the case is based entirely upon circumstantial evidence and he was entitled to an acquittal.

20 Am. Jur. 1043.

Allen vs. U. S. 164 U.S. 492 (1892).

State vs. White, 52 Nevada 236, 285 Pac. 508.

VIII.

THE TRIAL COURT ERRED IN FAILING TO ADMONISH THE JURY CONCERNING THE PREJUDICIAL REMARKS AND STATEMENTS MADE BY GOVERNMENT COUNSEL IN HIS ADDRESS TO THE JURY, AND OBJECTED AND EXCEPTED TO BY COUNSEL FOR THE APPELLANT.

The authorities of the other petitioners herein are relied on for this specification.

IX.

THE TRIAL COURT ERRED IN DENYING COUNSEL FOR OTHER PETITIONERS THE RIGHT TO MAKE OBJECTIONS

ON THE RECORD AND THE RIGHT TO MAKE STATEMENTS OR ARGUMENTS IN SUPPORT OF SUCH OBJECTIONS: AND THE TRIAL COURT FURTHER ERRED IN ADMONISHING COUNSEL FOR OTHER APPELLANTS IN THE PRESENCE OF THE JURY, THEREBY DEPRIVING APPELLANT, RALPH ALSUP, OF A FAIR AND IMPARTIAL TRIAL.

The authorities of the other petitioners herein are relied on for this specification.

X.

THE TRIAL COURT ERRED IN FAILING TO GIVE CERTAIN INSTRUCTIONS TO THE JURY AS REQUESTED BY THE PETITIONER.

The authorities of the other petitioners herein are relied on for this specification.

XI.

THE TRIAL COURT ERRED IN GIVING CERTAIN INSTRUCTIONS TO THE JURY TO WHICH THE PETITIONER DULY EXCEPTED.

The authorities of the other petitioners herein are relied on for this specification.

XII.

THE TRIAL COURT ERRED IN WEIGHTING ITS INSTRUCTIONS IN FAVOR OF THE APPELLEE OR GOVERNMENT AND IN FAVOR OF A VERDICT OF GUILTY, ALL OF WHICH WAS PREJUDICIAL TO APPELLANT.

The authorities of the other petitioners herein are relied on for this specification.

XIII.

THE VERDICT OF GUILTY HEREIN WAS INCONSISTENT WITH THE EVIDENCE AND NOT SUPPORTED BY THE EVIDENCE.

Authorities cited under specifications 6. and 7. herein and authorities cited by other petitioners herein upon this specification are relied on.

XIV.

THE COURT ERRED IN OVERRULING APPELLANT'S MOTION IN ARREST OF JUDGMENT.

Cases cited under specification 1. herein and cases cited by other petitioners herein are relied on upon this specification.

XV.

THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A NEW TRIAL.

The points herein raised are discussed under other specifications and authorities hereinabove cited and authorities cited by other petitioners are relied upon for this specification, except that at this point certainly the rule should be applied.

XVI.

THE EVIDENCE DISCLOSED THAT SAID APPELLANT, RALPH ALSUP, WAS IMMUNE FROM PROSECUTION PURSUANT TO TITLE 15 U.S.C.A. 17.

See authorities under specification 6. herein. Such authorities are relied on for this specification.

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

DATED: April 5, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 79

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HINDS, DON MCGARVIE, AND BERNARD V. PROVENZANO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84

RALPH ALSUP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 1502-1541) is reported at 210 F. 2d 732.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1954 (R. 1542), and a petition for rehearing was denied on March 22, 1954 (R. 1543). By order of Mr. Justice Douglas, dated April 15, 1954, the time for petitioning for a writ of certiorari was extended to May 21, 1954. The petition in No. 79 was filed on May 17, 1954, and the petition in No. 84 on May 20, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Petitioners were convicted of violation of section 1 of the Sherman Act under an indictment alleging, with full particulars, a conspiracy to restrain and suppress competition in the sale and distribution of plumbing and heating supplies to consumers in southern Nevada. The following questions are presented:

1. Whether the trial court properly instructed the jury as to the basis for determining whether the supplies involved were "in [interstate] commerce" within the meaning of the Sherman Act.

2. Whether the proof sustained the allegations as to "commerce."

3. Whether the evidence warranted the jury in concluding that petitioners conspired to divide the market and fix prices for plumbing and heating supplies.

4. Whether, under the facts charged and proved, petitioner in No. 84, a labor union official, was en-

titled to the immunity provided by section 6 of the Clayton Act.

5. Whether the court of appeals properly rejected as groundless petitioners' claims (a) that various rulings of the trial judge were erroneous, (b) that the trial judge manifested bias in favor of the Government, and (c) that Government counsel was guilty of prejudicial misconduct.

STATUTES INVOLVED

Section 1 of the Sherman Act (26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U.S.C. 1) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 6 of the Clayton Act (38 Stat. 731, 15 U.S.C. 17) provides:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation

of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

STATEMENT

Under an indictment returned on March 27, 1951 (R. 3-13), petitioners were charged with a conspiracy and combination to restrain trade, in violation of Section 1 of the Sherman Act. Petitioners Las Vegas Merchant Plumbers Association and Merchant Plumbers Exchange, Inc., are trade associations in which the remaining petitioners are members. All of the other petitioners, with the exception of Ralph Alsup, are plumbing contractors whose places of business are located in southern Nevada. Petitioner Alsup is the business representative and financial secretary of a labor union, Local No. 525, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

Petitioners were tried before a jury in the United States District Court for the District of Nevada (Foley, D.J.) during the month of October, 1951, and found guilty as charged. The court of appeals affirmed the convictions, writing a de-

tailed and careful opinion (R. 1502-1541).

The indictment is in one count, charging a combination and conspiracy to suppress and eliminate competition in the sale of plumbing and heating supplies in restraint of the interstate trade and commerce therein. The period of time involved is August, 1950, to March 27, 1951 (the date of the indictment).

The trade and commerce involved is described in paragraphs 12-17 of the indictment (R. 7-10). It is there alleged that practically all plumbing and heating supplies used in southern Nevada are manufactuered out-of-state and shipped in interstate commerce from other states to the state of Nevada (par. 12); that plumbing contractors in Nevada are engaged in the business of distributing, selling, and installing plumbing and heating supplies for profit (par. 13); that plumbing contractors who are members of the two petitioner trade associations handle more than three fourths of such supplies in the southern Nevada market (*ibid.*); and that a major portion of all the plumbing and heating supplies distributed to that market is sold by plumbing contractors charged in the indictment (*ibid.*).

It is also alleged that southern Nevada plumbing contractors obtain more than forty percent of their supplies by direct dealings with and direct shipments from manufacturers and wholesalers located in other states (par. 14). The remainder of their supplies is purchased through southern Nevada wholesalers who acquire the commodities

from out-of-state sources for resale. Substantial quantities of the supplies purchased by the Nevada wholesalers are bought pursuant to prior orders received from plumbing contractors, and substantial quantities of the supplies purchased by the wholesalers are shipped directly from out-of-state points to plumbing contractors. Par. 15. Moreover, it is alleged, substantial quantities of the plumbing and heating supplies ordered by southern Nevada plumbing contractors are shipped directly from out-of-state points to job sites, where they are installed in buildings by the contractors (par. 16).

The indictment states further that consumers of plumbing and heating supplies do not ordinarily install them, but depend upon the services of a plumbing contractor; that the performance of these services by the contractor is necessary to the movement of the supplies in interstate commerce; that "plumbing contractors, including those named as [petitioners] herein, are conduits through which plumbing and heating supplies manufactured in and shipped from States of the United States other than the State of Nevada, are sold and distributed to the consuming public in southern Nevada"; and that the supplies "flow in a continuous, uninterrupted stream from their points of origin in States other than Nevada to their places of installation and use in buildings in southern Nevada" (par. 17).

The nature of the conspiracy is set forth in paragraph 19 of the indictment. It alleges, so far as is now material, that petitioners entered into a

continuing agreement, the substantial terms of which were as follows:

(a) That a person known as an "estimator" would be employed (initially by the petitioner Association and thereafter by the petitioner Exchange) to determine and fix prices which plumbing contractors would charge for jobs involving the sale and installation of plumbing and heating supplies;

(b) That plumbing contractors, before making estimates or bids on a job, would submit plans and specifications to the common "estimator";

(c) That plumbing contractors would adhere to the prices determined by the "estimator";

(d) That when two or more contractors proposed to submit bids on a particular job, the "estimator" would notify a so-called Allocation Committee, composed of plumbing contractors or their representatives, which would designate one of the contractors as the person to submit the low bid;

(e) That when a job was allocated, other plumbing contractors would submit complementary or factitious higher bids;

(f) That in order to enforce compliance with the allocation plan, petitioner Alsup would induce qualified plumbers and pipefitters to refrain from working on a job for a plumbing contractor who had not been designated by the Committee to perform that job.

It is further alleged that, during the period covered by the indictment, petitioners "have done those things which * * * they combined and

conspired to do" (par. 20), and that the necessary effect has been unlawfully to restrain and obstruct the flow of plumbing and heating supplies in interstate commerce in southern Nevada (par. 21).

The court of appeals found that the evidence convincingly supported the essential allegations relating to commerce and to the formation and implementation of the conspiracy (R. 1516-1521). It further found that there were no errors of law in the conduct of the trial (R. 1521 *et seq.*). The underlying evidence and the challenged rulings and instructions of the district court are discussed at appropriate points in the Argument.

ARGUMENT

1. Petitioners concede (Pet., No. 79, p. 50) that "[t]he allegations of the indictment in this case set forth a pattern of flow of goods in interstate commerce designed to come within decided cases of this Court."[1] They state further that the case

[1] Petitioners have completely abandoned the contention, advanced in the district court and in the court of appeals (see R. 1503), that the allegations as to commerce are insufficient to make out an offense under the Sherman Act. As the opinion of the court of appeals points out (R. 1510-1512), the allegations charging restraint of trade in commodities in the flow of interstate commerce are clearly sufficient. The opinion refers to a number of cases in which comparable allegations have been upheld. To this list should be added this Court's recent decisions in *United States* v. *Employing Plasterers Association*, 347 U.S. 186, and *United States* v. *Employing Lathers Association*, 347 U.S. 198. In the *Plasterers* case, this Court observed (p. 189) that "the complaint alleged that * * * a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they

was submitted to the jury on an "in commerce" theory (*ibid.*).[2] They urge, however, that the instructions based on this theory were inadequate, and that the proof was in any event insufficient to warrant the conclusion that substantial quantities of the supplies involved were in interstate commerce at the point where the restraints attached. They also argue that, assuming the commodities were in the flow of interstate commerce and the petitioners were engaged in price-fixing and allocation of jobs at the retail level, the court should have charged that there was a further obligation on the Government to establish that the burden on commerce was direct and substantial.

a. Since petitioners concede the sufficiency of the trade and commerce allegations summarized in the Statement, *supra*, pp. 5-8, it is difficult to see the basis of their assertions that the instructions on this phase of the case were inadequate. For an examination of those instructions demonstrates that the jury was carefully and fully informed that it should determine whether the Government had proved its essential allegations beyond a reasonable doubt.

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reached there at all." In the instant case, the indictment alleges with full particulars that a local group of people were to a large extent able to dictate (a) the prices at which builders and home owners might obtain for their use plumbing and heating supplies which had to reach Nevada through interstate trade if they reached there at all, and (b) the particular contractor who would be permitted to make the ultimate sale and perform the installation.

[2] In this respect, petitioners are in agreement with the decision of the court of appeals. See R. 1530.

Instruction No. 25 begins with the statement (R. 128):

> The indictment alleges that there exists a flow of commerce from manufacturers of plumbing and heating supplies located outside of Nevada to their places of installation and use in buildings in Southern Nevada and that the plumbing contractors are conduits through which these supplies manufactured and shipped from other states are sold and distributed to the consuming public in Southern Nevada. It is for you to decide whether this allegation is true beyond a reasonable doubt.

The succeeding paragraphs of that Instruction (R. 128-129) summarize paragraphs 12-17 of the indictment. The Instruction concludes (R. 130):

> These heretofore mentioned matters concerning the flow of commerce are not of themselves unlawful, but if you find these allegations as to commerce to be true, and if you further find beyond a reasonable doubt that the defendants agreed in advance of the shipment of these supplies into the State of Nevada to fix the prices at which they would be distributed and sold after the completition [*sic*] of that interstate journey, then I instruct you that such fixing of prices necessarily affected the free and untrammeled flow of such supplies while they were still in interstate commerce.

Petitioners criticize the instructions (Pet., No. 79, p. 30) on the ground that the court's summary of the allegations fails to use the words "flow in a continuous, uninterrupted stream," which appear in the indictment. But the language relating to a "flow of commerce," etc., appearing in the opening sentence of Instruction No. 25, plainly imports the requirement of continuity. Moreover, the succeeding paragraphs of the Instruction set forth the precise allegations of fact which, if true, would establish the continuity of the stream. The jury was told to determine, on the basis of the truth or falsity of these allegations, whether there existed a flow of interstate commerce from the out-of-state origins to the places of installation, and whether the plumbing contractors served as conduits through which this flow was channeled. The total effect of these instructions was to pose the "in commerce" issue for the jury with fairness and clarity. Certainly, no particular words or phrases are required of a trial judge explaining the issues of an antitrust case, and "no mechanical rule can be laid down to control [him] * * *. He must be free to exercise 'a well-established range of judicial discretion.'" *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 571.

It is also urged that the trial judge should have explicitly instructed the jury to take into account the fact that plumbing contractors do not ordinarily sell individual supplies in their raw form, but are "engaged in the business of installing plumbing and heating commodities as a portion of struc-

tures * * * being constructed within the State of Nevada" (Pet., No. 79, p. 31). However, the indictment charges (par. 13, R. 8) that petitioners are engaged in the business of "distributing, selling and installing plumbing and heating supplies," and the instructions (Instruction No. 25, R. 128) use the same language in summarizing the indictment. There was no necessity to go beyond this description and to ask the jury to determine specifically whether a sink or bathtub so changes its character when it is connected to a pipe and placed in a building that the person who installs it is no longer to be deemed a person engaged in the distribution of plumbing supplies. We recognize, of course, that the processes of assembly, fabrication, or manufacture may in some circumstances so fundamentally change the character of a commodity as to break the flow of commerce. See discussion in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 238-244. But it is plain that the jury could not have made such a finding here. As petitioners recognize, the component commodities of the installed plumbing and heating systems are not converted into new and different commodities; they are simply assembled or connected and put into place. There is, moreover, no question here of the possible effect of commingling supplies moving in interstate commerce with other commodities having a local situs. It is undisputed that all of the plumbing and heating supplies which the plumb-

ing contractors receive and install come from out of state.

b. In their attack upon the sufficiency of the evidence (Pet., No. 79, pp. 50-57), petitioners recognize (1) that quantities of plumbing and heating supplies are shipped directly from out-of-state points to plumbing contractors at job sites, and (2) that quantities of plumbing and heating supplies are purchased by Nevada wholesalers from out-of-state manufacturers in response to specific prior orders received from plumbing contractors. They suggest, however, that the quantities included in these two categories are not sufficiently substantial to sustain Federal jurisdiction under the Sherman Act. With respect to a third category—supplies shipped to Nevada wholesalers or plumbing contractors and held in stock for a period of time prior to actual installation and use—it is urged that the evidence does not permit the conclusion that there was a continuous and uninterrupted stream. We submit that there was ample evidence to sustain the verdict and that these issues as to the weight of the evidence do not in any event present a question of general importance warranting a second appellate review of the record.

Petitioners assert (Pet., No. 79, pp. 54-55) that the record shows shipments from out-of-state points to job sites "amount[ing] to $6,562.27 or approximately 1% of the total purchases of plumbing and heating supplies during the [eight-month]

indictment period." This statement is seriously in error. Thus, it completely disregards the fact that, during the indictment period, $42,801.53 worth of plumbing supplies were shipped directly from a Los Angeles supplier to the job site at which the Las Vegas Race Track was being constructed (Exs. 3 and 4, not printed; R. 352, 623, 628, 993). Discussing this shipment, the court of appeals stated (R. 1519):

> An order for $42,800 worth of plumbing supplies was shipped to the job site of the Las Vegas Race Track from a Los Angeles supplier, for use by a Los Angeles plumbing contractor, not a party to the conspiracy. The job had been allotted by appellants to one of their number but when the Los Angeles contractor received the contract award, two of appellants asked Alsup, the plumbers' business agent to "protect" them and for several months plumbers refused to work on the job. Here was direct evidence of the impact of the conspiracy on interstate commerce.

Adding this item, it appears that approximately $50,000 worth of shipments to job sites, rather than $6,000, took place during the period involved.[3] The percentage figure, on this basis, is approximately eight per cent rather than one per cent. Commerce in this volume plainly cannot be dis-

[3] Actually, there is other evidence on the same point which petitioners' statement fails to take into account. See R. 933, 941-942.

missed as *de minimis.*[4] Accompanied by proof of illegal restraint (see *infra,* pp. 19-21), these shipments alone would plainly warrant a finding of violation of the Sherman Act.

As petitioners concede (Pet., No. 79, p. 53), the record also shows that, during the indictment period, a Nevada wholesaler, Standard Wholesale Supply, purchased approximately $14,000 of plumbing and heating supplies from out-of-state manufacturers in response to special orders placed by Nevada contractors. These supplies, which moved without interruption to the contractors, must be added to the figures set forth in the preceding paragraph in determining the total amount of commerce which is indisputably interstate.

Petitioners would completely disregard all plumbing and heating supplies which were placed in stock—either the stock of a Nevada wholesaler or of a Nevada plumbing contractor—between the date of the original shipment from out of state and the time of installation in a Nevada building. The evidence shows, they argue, that stocked supplies remained "on the shelves * * * for substantial and varying lengths of time" (Pet., No. 79, pp. 51-52). They ignore, however, the testimony of the principal Nevada wholesaler that it

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[4] See *Montague & Co.* v. *Lowry,* 193 U.S. 38, 46; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 224, note 59; *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225-226. Cf. *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178, 180, 184; *National Labor Relations Board* v. *Denver Building Council,* 341 U.S. 675, 683-684.

is his company's practice to keep inventory to a minimum and to place orders for merchandise at regular intervals in anticipation of the constant and recurring demand of the plumbing contractors to whom the commodities are resold (R. 1080). From this and other evidence, the jury could properly have concluded that the break in transportation occurring at the wholesale level was not the equivalent of a break in the commerce involved. Cf. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 237-238; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564, 570.

There is, in any event, a further flaw in petitioners' argument. The undisputed evidence shows that, of the total amount of supplies shipped to Nevada plumbing contractors, forty-six percent was sold and shipped directly by out-of-state suppliers to the contractors (R. 1518). Petitioners cannot dismiss this commerce from consideration by asserting that most of it went into contractors' inventories before being used on particular jobs.[5] For the conspiracy, if successful, was nonetheless one which would necessarily influence and control the course of that substantial segment of commerce (forty-six percent) moving directly from out-of-state suppliers to local contractors. The conspiracy which was charged (see

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[5] For present purposes, we pass the point that large quantities of the supplies which went into contractors' stock were destined for particular jobs and were merely held temporarily in inventory to conform to building schedules. See Exs. 1, 5, 29-32, 37 (not printed).

indictment, pars. 19(f), 21(b), R. 11-12) and proved (see *infra,* pp. 19-21) involved, not only price fixing, but a plan to divide business among the members of the "Association" and to withhold business from non-members by the employment of techniques of boycott. To the extent that it was effective, such a conspiracy necessarily channelized the flow of supplies to and among particular contractors (the conspirators) and dried up the flow of supplies to other contractors (the non-members of the "Association").[6] From an early date and with great consistency this Court has condemned as illegal under the Sherman Act combinations, enforced by boycott or other means, to cut off or otherwise restrain local trade outlets for goods sold or shipped interstate.[7]

The Government, of course, was not obliged to

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[6] It is, of course, unnecessary to evaluate the extent to which the conspirators were in fact successful in appropriating and dividing the business among themselves. "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, note 59. See, also, *Nash* v. *United States*, 229 U.S. 373, 378; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402.

[7] See, *e.g.*, *Montague & Co.* v. *Lowry*, 193 U.S. 38 (tiles); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 48-49 (enameled ironware); *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U.S. 600, 611 (lumber); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 465 (women's clothes); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (motion pictures); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226 (taxicabs); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (news and advertising).

prove that all of the commerce subject to the restraints was interstate commerce. It sufficed to show that substantial quantities were of that character. The jury was fully warranted in concluding that such a showing had been made.

c. Petitioners argue at some length (Pet., No. 79, pp. 35-49) that the trial court erred in failing to instruct the jury that, if it found that the commodities involved were in the flow of interstate commerce and that petitioners were engaged in price fixing and allocation of jobs at the retail level, it should then determine whether the effect of those restraints was "direct and substantial" rather than "indirect and remote."

When restraints of trade operate upon goods which are still in the flow of interstate commerce, the effect, by definition, is a direct one. The cases from which petitioners seek comfort are cases in which the commodities themselves were not in interstate commerce and in which it was accordingly necessary to determine whether a prior or subsequent movement in interstate commerce was nevertheless "affected."

If petitioners' argument as to "substantiality" means that the volume of commerce involved must be something more than a *de minimis* quantity, there is no occasion for disagreement. As shown above, the indictment charged that the restraints operated on substantial quantities of goods in interstate commerce, and the evidence and the instructions to the jury were in keeping with these allegations. If it is meant, however, that the court's charge should have held the Government

to the requirement of showing in quantitative terms the burden on interstate commerce threatened or caused by petitioners' offenses, petitioners are plainly in error. Conspiracies to fix the prices of goods in interstate commerce (*United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397; *United States* v. *Masonite Corp.*, 316 U.S. 265, 276) and conspiracies to divide the market for such goods (*Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 241; *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523 (S.D.N.Y.) affirmed, 332 U.S. 319) are *per se* unreasonable. The injury or threat of injury to commerce is conclusively presumed. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, note 59.

2. Petitioners argue that the evidence as to conspiracy was insufficient to support the verdict. The jury, the district judge, and the court of appeals found to the contrary. And the lengthy record amply sustains the conclusion of the court of appeals that the evidence "concerning the nature of the conspiracy, [and] its operations" was "clear and convincing," and that such evidence "clearly supported the verdict" (R. 1521). There is no need for further review of the evidence by this Court.

The conspiracy had its inception at two meetings at which the individual defendants discussed the formation of an organization of plumbing contractors in Las Vegas "to figure out prices, to figure out ways and means of charging the work of contracting" (R. 520-521, 530). It was decided to set up a central estimating bureau to

which the plumbing contractors would refer jobs for estimating, and "that was the price that would be charged" (R. 521, 528). The estimating bureau was established (R. 532), a common estimator was selected (R. 521), and an allocation committee was set up to "allocate the jobs as they came through" (R. 531, 560, 642-643, 803). Petitioner Alsup, an official of the plumbers' union, was present at the first of these meetings, and when one of the plumbing contractors expressed doubt whether the scheme would work, Alsup told him that he (Alsup) thought he could make the scheme "work" because if people would not go along with it, "he was in a position to handle the men, to put them in a position where they would go along" (R. 523).

Shortly thereafter, the estimator began his duties of "estimating work for various plumbers" (R. 639, 640). When only one contractor was interested in a job, the estimator gave his estimate directly to that person (R. 642). When more than one contractor was interested, however, the estimator turned his figures over to the chairman of the Allocation Committee "for action by the Association" (R. 642, 643). In such cases, the estimator was informed of the decision of the Allocation Committee, and "the person who was indicated was to use the individual estimate that I had prepared" (R. 644). On the jobs which he had estimated, the estimator kept a record of the bids which the contractors submitted and the identity of the successful bidder (R. 652-656).

The record shows numerous instances in which, pursuant to the conspiracy, jobs were allocated,

prices were fixed, and collusive higher bids were submitted to protect the chosen contractor. Petitioners' discussion of the evidence as to conspiracy (Pet., No. 79, pp. 58-63) relies on isolated excerpts from the record, and gives nothing approaching an adequate picture of the facts upon which the jury's verdict was based.[8] The full picture, reviewed and summarized by the court below (R. 1519-1521), solidly supports the verdict.

3. Petitioner in No. 84 is the business agent of the local plumbers union. In addition to adopting the arguments of petitioners in No. 79, he makes the separate argument (Pet., No. 84, p. 12) that,

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[8] Thus, for example, petitioners' brief reference (Pet., No. 79, p. 61) to the allocation of the "Ward and Ward" job to petitioner Hynds fails to set forth the significant facts. The full story actually constitutes a dramatic example of the conspiracy in action. Without stating it in detail, the evidence as to this episode shows that the conspirators did operate in the agreed fashion to allocate the job to Hynds, that other contractors accordingly refrained from underbidding Hynds, and that a contractor who attempted to disrupt the scheme by submitting a lower bid withdrew that bid after he was threatened with a walkout of his employees by petitioner Alsup, the union official (R. 656-659, 753-755, 757, 799-800, 807, 861-862, 934, 936-937, 960).

Another example of the conspiracy in action was petitioners' attempt to protect the allocation of the plumbing work at the Las Vegas race track to one of the conspirators (R. 939-940). When that contractor failed to obtain the job because his bid did not meet the specifications (R. 880-881, 883), and the contract was awarded to a Los Angeles contractor (R. 878, 885), the unsuccessful conspirator asked Alsup for protection (R. 980). For several months thereafter, the Los Angeles contractor was unable to obtain plumbers from Alsup to do the work (R. 986-988), although during that same period he did obtain plumbers to work on an Atomic Energy Commission project in Nevada (R. 989).

by virtue of section 6 of the Clayton Act, he is immune from prosecution under the Sherman Act because his activities were "not in furtherance of any unlawful agreement or conspiracy," but were "solely in the interest of the union." This contention is without merit.

It is well settled that labor unions and their officials and members do not enjoy any blanket exemption from the Sherman Act. Once such groups "combine with non-labor groups," *United States* v. *Hutcheson,* 312 U.S. 219, 232, and "aid and abet business men to do the precise things which that [Sherman] Act prohibits", *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, 801, they come within the Act's prohibitions. Section 6 of the Clayton Act does not immunize labor unions and their officials who "aid and abet manufacturers and traders in violating the Sherman Act" by "fix[ing] prices and divid[ing] up markets." *Id.* at 810. See, also, *United States* v. *Employing Plasterers Association,* 347 U.S. 186, 190.

The trial judge applied this rule in charging the jury as to the test to be used in determining Alsup's guilt. He charged (R. 121) that a representative of a labor union cannot be found guilty of violating the Sherman Act as long as he "acts solely in the self-interest of the union and does not combine or conspire with a non-labor group," but that if such representative "does so combine and conspire with any group of businessmen and employers to aid and abet them to unlawfully fix

prices and control markets," it is no defense to say that such action is in furtherance of the self-interest of the union members as wage earners. Thus, when the jury found petitioner Alsup guilty, it concluded, in accordance with the court's instructions (R. 122), that he "did combine, conspire and agree with the other defendants that in order to enforce compliance with and adherence to * * * [an] agreement to fix prices and allocate bids * * * Alsup, would induce journeyman plumbers not to work on any job for any plumbing contractor other than one designated and agreed upon by the defendants to submit the lowest estimate or bid," and that his activities had not been "in furtherance of any legitimate objective of the union he represented * * *." As the court of appeals held (R. 1537), the evidence was plainly sufficient to support this conclusion. See, *e.g.*, R. 523, 757, 936-937, 980, 986-988.

4. Petitioners in No. 79 make a variety of other contentions, all of which were considered and rejected by the court of appeals as "without sufficient merit" to warrant discussion (R. 1541).[9]

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[9] Petitioner in No. 84 also argues (Pet., pp. 18-20) that the trial court improperly admitted hearsay testimony as to statements made by the common estimator. Although the common estimator was not indicted, he was, as the court of appeals held (R. 1539), either one of the conspirators or their agent. The court of appeals thus correctly concluded that his statements, made in furtherance of the conspiracy, were properly admitted against petitioner Alsup, either as an admission by a co-conspirator, or as a statement by an agent binding his principal (*ibid.*).

We consider the principal ones briefly.

a. Petitioners contend (Pet., No. 79, pp. 66-69) that Government counsel made improper remarks in his closing argument to the jury. They argue that, by drawing an analogy between the crime for which petitioners were on trial and the misdemeanor of passing a stop-light in an automobile, he suggested to the jury that conviction would carry a light penalty. The cited portion of the argument, however, shows that Government counsel used this analogy in explaining to the jury that specific criminal intent is not an essential element of a Sherman Act violation, and that he made no reference to possible punishment. Plainly, his remarks were not improper.

b. Petitioners next argue (Pet., No. 79, pp. 70-74) that the trial judge treated one of their counsel with marked hostility. To support this allegation, they rely on three instances in which the court cut off further argument by him. These isolated fragments of colloquy do not give a true picture of what occurred. The full record shows that in each instance the court found it necessary to silence counsel because of his persistent attempts to continue arguing evidentiary questions after the court had ruled upon them.[10]

c. Similarly without merit is petitioners' con-

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[10] For example, petitioners refer to pages 682-683 of the record, where the court refused to listen to further argument from their counsel, Mr. Schullman, and directed him to "Be quiet—sit down" (R. 683). Just prior thereto, petitioners' co-counsel, Mr. Richards, had shown a document to a witness, and the court had directed the witness to read the document to

tention (Pet., No. 79, pp. 74-76) that the judge showed bias in favor of the Government because he denied as untimely petitioners' motion to strike evidence, while allegedly granting like motions by the Government. Petitioners' motion was to strike a series of questions and answers covering two pages of the transcript, and the motion admittedly was withheld until that line of questioning had been completed (R. 533-535). The court denied the motion for failure to make timely objection to the various questions when asked (R. 535). The Government's motions, to which petitioners refer, were made under entirely different circumstances. Twice in succession, defense counsel asked a question which was answered "Yes" before Government counsel had a chance to object (R. 1089-1090). He did so immediately after the answer had been given, and each time the objection was sustained (*ibid.*). Obviously, the objection of Government counsel was timely.

d. Finally, petitioners argue (Pet., No. 79, pp. 81-88) that the district court erred in denying their motion for a new trial on grounds of newly discovered evidence. This evidence was that several months after petitioners were convicted, the stockholders of the Las Vegas race track filed a petition in bankruptcy, and criminal complaints were is-

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himself, since it was not in evidence (R. 682). Mr. Richards had the document marked for identification and then, without offering it in evidence, attempted to read from it. The court, applying settled law, refused to permit Mr. Richards to read from something not in evidence. It was at this point that Mr. Schullman attempted to argue the ruling further, and the court found it necessary to silence him.

sued against certain race-track officials. Clearly, as the district court stated (Supplemental Transcript, Oct. 7, 1952, p. 18, not printed) in denying the motion, such evidence was not "material to the issues involved in this case." The Government never contended that the strike at the race track was due to petitioners' conspiracy. Indeed, Government counsel told the jury in his opening argument that the race-track strike "is no part of this case" (R. 1426). Since the proffered evidence would have been irrelevant and inadmissible at any retrial, there was no basis for the motion for a new trial.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and the petitions present no important question of federal law. The petitions for writs of certiorari should be denied.

Respectfully submitted,

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JULY, 1954.

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IN THE

Supreme Court of the United States

October Term, 1954.
No. 79
(October Term, 1953
No. 766)

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE, and BERNARD V. PROVENZANO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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IN THE

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LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE, and BERNARD V. PROVENZANO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Las Vegas Merchant Plumbers Association, Merchant Plumbers Exchange, Inc., A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie, and Bernard V. Provenzano, pray for a rehearing of the Order of this

Court made on October 14, 1954, denying their Petition for Writ of Certiorari, and predicate their request herein upon the following grounds:

I.

There Is a Conflict and a Divergence of Substantial and Major Importance in the Decisions of the Several Circuits of the United States Court of Appeals, With Respect to the Submission to the Jury of the Question of Whether Commodities Involved Are, in Fact, "in Interstate Commerce."

The decision of the Ninth Circuit of the United States Court of Appeals in this case (210 Fed. 2d 732), affirming the judgment of the Trial Court, virtually accepted the reversible error which was committed by the Trial Judge in failing to submit to the jury the question of whether the commodities involved were, in fact, "in interstate commerce."

The denial of the Writ of Certiorari by the United States Supreme Court does not involve any decision upon the merits of the case, and imports to that Court no view upon the merits of the controversy.

U. S., ex rel. Cook v. Dowd, 180 Fed. 2d 212, vacated 340 U. S. 206;

Beal v. U. S., 182 Fed. 2d 565, cert. den. 340 U. S. 852.

Hence, the denial by this Court of the Writ of Certiorari leaves the ruling by the Ninth Circuit of the United States Court of Appeals with the legal proposition that the determination of whether or not commodities are in interstate commerce is a question of law and need not be submitted to a jury for a factual determination.

Similar questions have been presented to other Circuit Courts of the United States of Appeals and, as a result, there are completely inconsistent rulings of major importance, and a conflict arises to determine whether the decision of the Ninth Circuit of the Court of Appeals in this matter is the correct decision, or whether the decision of the other Circuits recognizing the necessity of submitting such questions to the jury, as questions of fact, represent the correct law.

This can only be resolved by granting this Petition for Rehearing and having the matter fully heard and determined by this Supreme Court of the United States.

The Record has been thoroughly set forth in the Petition for Writ of Certiorari. For the present purpose, however, it is sufficient to say that the commodities involved represented goods which came to rest at their point of destination. They remained at their place of destination for undetermined and long periods of time before any of the acts complained of in the Indictment took place, and that admittedly after the acts complained of took place, the goods in question became part of and were intermingled with the real estate of the state, never to be moved again in the channels of interstate commerce.

The jury at the trial had not been charged by the Court or received instructions with respect to the activities of Petitioners as affecting commerce in any manner whatsoever.

The Trial Judge in Instruction No. 26 [R. pp. 130-131] practically advised the jury that the goods involved had been shipped in interstate commerce. It has been and is the position of the Petitioners that the effect on interstate commerce is a basic issue to federal juris-

diction. Nevertheless, in Instruction No. 26, the Trial Judge practically told the jury to disregard whether or not the goods had come to rest within the state, and took from the jury the question of whether the acts of Petitioners had, in fact, any effect upon the interstate flow of goods. As a result, the Trial Judge destroyed the entire rule, by judicial precedent, as set forth in many cases in this Court and by the decisions of other circuits of the United States Court of Appeals, which draw a line between acts subject to federal jurisdiction under the Sherman Act and those acts purely within the state and intrastate and, therefore, beyond the reach of the Sherman Act.

The Trial Court refused Defendants' Instruction No. 18 [R. pp. 75-76], which would have remedied this defect and permitted the jury, as a question of fact, to make its determination.

In the trial, the uncontradicted testimony, both from government witnesses and Petitioners, established: that the purchases indirectly were made from out of town sources, and except in rare instances, remained on the shelves of the plumbing contractors and wholesalers within the State of Nevada for long periods of time; that the supplies, such as valves, fixtures, fittings and so forth, had to be processed and combined with other supplies in order to be utilized; that pipe had to be cut, fitted and treated before installation; that the processing of various plumbing and heating supplies normally took place in the shop of the plumbing and heating contractor, or, in rare

instances, where the particular job was of a character that the physical layout of the contractor could not accommodate fabrication in the shop, the work was done on the job. Accordingly, the contractors and Petitioners were "selling" services and their skill in order to apply fabricated commodities to be put *at rest* and become *part of the realty within the state.* [R. pp. 392, 447, 572, 586, 943, 944, 1075, 1232.]

On the basis of the facts before the jury, the jury could have found, and we submit, would have found, if properly instructed, that as a matter of fact, there was no interstate commerce.

In *Brosius v. Pepsi-Cola Co.,* 155 Fed. 2d 99, the Third Circuit Court supported the factual determination with respect to the flow of commerce and cited both the First, Tenth and Seventh Circuit Courts on the same issues, citing *Lipson v. Socony-Vacuum Corporation,* 87 Fed. 2d 276 *Jewel Tea Company v. Williams,* 118 Fed. 2d 202, and *Walling v. Goldblatt Brothers,* 128 Fed. 2d 778.

Not only does the conflict exist among the several Circuits, but most importantly, the decision of the Ninth Circuit Court in this case is contrary to the decisions of this Court. In *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, the importance of a factual finding on the question of final destination and coming to rest in the flow of goods, interstate, was coruscatingly established; and where shipment was made of stock items and came

to rest intrastate, such goods were held not be in interstate commerce.

In the instant case, the Trial Court compounded its error in Instruction No. 25 [R. pp. 128-130], which reviewed the allegations of the Indictment and practically told the jury it was not to consider whether the goods were uninterrupted in their interstate movement, but urged the substitute concept of law that a violation of the Sherman Act can be found if there has been a conspiracy to fix prices for goods which at any time or under any circumstances find their way into a state from an out of state source as long as the alleged conspirators are "an integral part of and necessary to" the interstate movement of the goods. This, again, is in variance and in conflict with the decisions of this Court and with other federal courts.

This is emphasized in the case of *U. S. v. National Assn. of Real Estate Boards,* 339 U. S. 485, 492, 70 S. Ct. 711, 716 (1950), which cited with approval *Hopkins v. U. S.,* 171 U. S. 578, and *Anderson v. U. S.,* 171 U. S. 604.

Of course, in the *Real Estate* case, interstate commerce was found because it occurred in the District of Columbia. Mr. Justice Douglas, at page 492, stated:

> *"Hopkins v. United States,* 171 U. S. 578 * * * and *Anderson v. United States,* 171 U. S. 604 * * * are not opposed to this conclusion. It was held in those cases that commission merchants and yard traders on livestock exchanges were not engaged in inter-

commerce even though the livestock moved across state lines, *cf. Stafford v. Wallace,* 258 U. S. 495 * * *, and therefore that the rules and agreements between the merchants and traders (which included in the Hopkins case the fixing of minimum fees) did not fall under the ban of the Sherman Act. But we are not confronted with that problem here. As noted, we are concerned here not with interstate commerce but with trade or commerce in the District of Columbia."

Mr. Justice Jackson dissenting at page 496, stated:

"If real estate brokerage is to be distinguished from the professions or from other labor that is permitted to organize, the Court does not impart any standards for so doing.

"It is certain that those rendering many kinds of service are allowed to combine and fix uniform rates of pay and conditions of service. This is true of all laborers, who may do so within or without unions and whose unions frequently do include owners of establishments that employ, others, such as automobile sales agencies. See, for example, *International Brotherhood of Teamsters, etc. v. Hanke,* 339 U. S. 470, 70 S. Ct. 773. I suppose this immunity is not confined to those whose labor is manual and is not lost because the labor performed is professional. The brokerage which is swept under the anti-trust laws by this decision is perhaps a border-line activity. However, the broker furnishes no goods and performs only personal services. Capital assets play no greater part in his services than in that of the lawyer, doctor or office worker. Services of the real estate broker, if not strictly fiduciary, are at least those of a trusted agent and, oftentimes, advisory as to values and procedures. I am not persuaded that

> fixing uniform fees for the broker's labor is more offensive to the anti-trust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a *plumber*. I would affirm the decision of the court below." (Emphasis added.)

The most recent decisions of *United States v. Employing Plasterers' Association*, 74 S. Ct. 452, and *United States v. Employing Lathers' Association*, 74 S. Ct. 455, do not change the conflict in law between the decision of the Ninth Circuit Court in the instant case and the other Circuit Courts and this Court. In the *Plasterers* and *Lathers* cases, the Court held as legally sufficient the language of indictments, but as a matter of fact, in the *Plasterers* case, 74 S. Ct. at 454, the opinion recognized the requirement that allegations of an indictment must be supported by the evidence and, of course, such evidence on such questions of fact, are always questions for the jury.

It is necessary, therefore, to resolve these conflicts of the law. It is of importance to the Petitioners and to every small business man, so that out of the confusion that exists with respect to their activities which may be deemed to be purely legal under the state laws, such small business men may be properly advised by a decision of this Court as to exactly what they can and cannot do in such matters, and have, at least, the judicial certainty that such questions of fact will be submitted to a jury.

II.

The Sherman Anti-trust Law, in the Case Before This Court, Was Applied and Administered by the Public Authority With an Evil Eye and an Unequal Hand With Respect to the Petitioners Herein.

Yick Wo v. Hopkins, 118 U. S. 356.

In exactly the same kind of case, involving practically the same facts, except a different group of plumbing contractors, the Justice Department and the Federal Court of Nevada agreed to and accepted a consent arrangement whereby the contractors permitted the entry of judgment, but the judgment stipulated that there was no finding that anti-trust laws were violated.

On November 15, 1952, the RENO EVENING GAZETTE published the following announcement.

"PLUMBING BID PRACTICES SET IN COURT FINDING.
Judgment Entered by Consent in Federal Court.

Approved Friday afternoon in federal district court was a consent judgment which ended civil antitrust action by the government against the Reno Merchant Plumbing and Heating Contractors, Inc., a trade association, and 14 of its master plumber members.

The Government in its 1950 complaint alleged the defendants were controlling contract bidding in such a fashion that free competition was stifled.

NO VIOLATION.

The judgment, accepted by both sides, *made no finding that antitrust laws were violated.* It did, however, list conditions under which bidding must be accomplished.

> Federal Judge Roger Foley, who was in Reno supervising pre-trial conferences for coming federal cases in Carson, signed the judgment.
>
> It was prepared by Charles F. B. McAleer of the judgment and judgment enforcement section of the antitrust division, under the supervision of Edwin H. Pewett, acting chief of the section. The case was handled by Wallace Howland and Lyle L. Jones of the San Francisco, Calif., office of the antitrust division * * *". (Emphasis added.)

In the Reno case referred to above, it was the same Justice Department, the same Federal Judge, and practically the same set of facts, yet *there was no criminal indictment and no requirement* that anyone plead *nolo contendre* or stipulate to violation of the Sherman Anti-Trust Law.

The policy of the Department of Justice presently seems to follow more equitably the *Yick Wo* decision.

In the Los Angeles Times of July 17, 1953, page 1, Part II, there appeared an article as follows:

> "Administration Will Enforce Antitrust Laws, Says Barnes.
>
> Persecution in Some Past Cases Hinted.
>
> "President Eisenhower and Atty. Gen. Brownell are very much convinced that the antitrust laws must be enforced. But they believe that they have, perhaps, in the past been in some instances an example of *persecution* rather than proper prosecution." (Emphasis added.)

This policy accentuates the apparent injustice in the prosecution of the present case and makes it imperative that as a question of fact, whether the commodities were in interstate commerce, should have been submitted to the jury.

III.

The Decision by the Ninth Circuit of the United States Court of Appeals, on the Case Herein, Creates a Conflict With Respect to the Question of Intent.

The Trial Court in Instruction No. 18 [R. p. 123], Instruction No. 19 [R. p. 124], Instruction No. 20 [R. p. 125], and Instruction No. 22 [R. p. 126], charged the jury with respect to a conspiracy, but omitted therefrom any reference to the concept of intent on the part of the Petitioners with respect to any agreement and its effect upon interstate commerce.

If, as a matter of fact, there was no intent on the part of the Petitioners, or if such intent had an indirect effect of no consequence or substance on interstate commerce, there could be no conviction.

> *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 229, 234, 235;
>
> *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 547.

Petitioners, however, offered instructions on the questions of intent, which instructions were rejected by the Trial Judge [Defendants' Proposed Instructions Nos. 12, 14, 15, 22 and 24; R. pp. 68, 69, 71, 79, 80-81].

> *United States v. Park Motors* (1952, U. S. Dist. Ct. for Tenn, N. D.), 107 Fed. Supp. 168.

In the trial of this case [R. pp. 1154-1155], one of the Petitioners and Defendant testified that they had legal counsel with respect to the association. At page 1155 of

the Record, Bernard V. Provenzano, on direct examination, testified, as follows:

> "Q. Will you tell us the circumstances under which counsel were engaged, what happened thereafter and what happened in respect to papers and documents as indicated by Exhibit 55? Very brief. A. We had a meeting in my office, at which there were five or six of us and we had previously called Mr. Coulthard to meet with us at that time and we discussed with him what we would like to do and asked his legal advice as to what we were planning, if we could in any way get into trouble, and he said, 'There is nothing here.' We said, 'In that case, we would like to organize,' and I gave him the names of everybody present. In the meantime Bill went to the Legislature, never had the papers drawn up."

In the trial [R. pp. 1197-1208], Counsel for Petitioners, in the absence of the jury, offered to put in evidence Defendants' Exhibit "A," a document issued by the Government of the United States, entitled "Establishing and Operating a Heating and Plumbing Business," issued particularly by the United States Department of Commerce, and offered to prove that it was used at the meetings of the Petitioners, read at their meetings, used as a guide and as an absolute method of bids. The Court rejected this offer, and denied the admission of said Exhibit "A" in evidence.

We believe this testimony was material to the question of intent with respect to the charge in the Indictment, and should have been admitted in evidence for the consideration of the jury.

Morissette v. U. S., 342 U. S. 246 (1952).

In *Times-Picayune Pub. Co. v. U. S.*, and *U. S. v. Times-Picayune Pub. Co.*, consolidated and decided May 25, 1953, in 345 U. S. 594, this Court reversed the District Court's judgment with respect to newspapers utilizing a unit newspaper advertising plan. This case is significant in that the Court held that since the compulsory combination advertising contracts which forced the advertiser to purchase space in the evening newspaper as part of the price of access to the single morning newspaper, *were motivated by legitimate business aims, the government failed to establish the specific intent essential to sustain an attempt to monopolize under the Sherman Act.*

Both as to the facts and the law, this case is on all fours with the instant matter before this Court on the question of specific intent.

IV.

The Misconduct of the United States Attorney in His Closing Argument, in Referring to the Nature of the Punishment, Denied Petitioners a Fair Trial and Due Process.

The decision by the Ninth Circuit of the Court of Appeals in this case, and on this matter, again creates a conflict not only with various state decisions but with federal decisions. The United States Attorney in his closing remarks to the jury, with particular emphasis, stated [Tr. pp. 1450-1451], as follows:

> "As my friend, Mr. Schullman, pointed out this afternoon, the use of the word 'conspiracy' is no crime. The Court will instruct you that in an anti-trust case there is no specific criminal intent necessary. *The offense againts the anti-trust laws is not a felony.* But that is not required, what lawyers call

criminal intent. You all know that in a murder case it must be proved, not only was the murder committed, but it was committed with malice aforethought. That is not involved here. We have here a statute which more than sixty years ago *Congress enacted to be a misdemeanor. You have many ordinances in your own communities which are misdemeanors. One of the ones which all of us run afoul of most frequently perhaps is overrunning a stoplight with an autombile.* Now it doesn't make any difference whether you went through the *red light* and whether you saw it or didn't or intended to violate the law or didn't, doesn't make any difference. If a law enforcement officer sees you doing it, he gives you a ticket *and you are charged with a misdemeanor,* a violation of an ordinance, which says you should not go through a *red light.*

"The Sherman Act is *simply an act reserving* (*sic*) competition in business where there is an effect upon interstate commerce.

"It gives a green light to businessmen who act independently of each other in fair and open competition, and *it gives a red light* to combinations and associations of businessmen who act collectively and in concert to suppress competition of others." (Emphasis added.)

This deprived the Petitioners of a fair trial and of due process, since it took away from the jury the right of a free determination. Many weeks having elapsed in the trial, and the Government having gone to great expense, the remarks of the United States Attorney made it "easy" for the jury to find the Defendants guilty of a slight misdemeanor comparable to a traffic violation of going through a red light, the jury feeling secure that there

would be nothing but a small fine. That is the only conclusion to be drawn from such remarks of the United States Attorney, and the Trial Court refused to correct the error.

In *People v. Kirkes,* 39 Cal. 2d 719; *People v. Byrd,* 42 Cal. 2d 200 (1954); *People v. Afarian,* 108 N. Y. S. 2d 533, and in *Mendelson, et al. v. United States,* 58 Fed. 2d 539 (1932, D. C. Ct. of Appeals), remarks similar to those made in the instant case were held to be most improper.

As the Court said in the case of *People v. Afarian,* 108 N. Y. S. 2d 533, at page 538:

> "It is most improper to urge a conviction by means of an assurance of a soft penalty."

In *People v. Beal,* 116 Cal. App. 2d 475 (1953), at page 477, the Court said:

> "That the argument of the district attorney was highly improper and constituted prejudicial misconduct compelling a reversal is not debatable. In the recent case of *People v. Kirkes,* 39 Cal. 2d 719, the district attorney made substantially the same argument to the jury as was made in the present case * * * ."

In *Berger v. United States,* 295 U. S. 78 (quoted with approval in *Vierick v. United States,* 318 U. S. 236), at page 88, the Court said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be

done. As such, he is in a peculiar way and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. *It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use very legitimate means to bring about a just one.*" (Emphasis added.)

Conclusion.

It is respectfully urged that, for the foregoing reasons, and so as to secure a conformity of decisions with respect to these major, important and substantial matters, this Court grant a rehearing, and Petitioners respectfully pray therefor; since these matters not only are serious as affecting these Petitioners, but the law on these matters remains in a state of conflict between the several Circuits and, in fact, is in conflict with the decisions, enunciated by this Court itself.

Therefore, it is respectfully suggested, and again requested by Petitioners, that this Petition for Rehearing be granted, and this case be heard by this Court.

Respectfully submitted,

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By ALEXANDER H. SCHULLMAN,
Counsel for Petitioners.

Dated: November 4, 1954.

Certificate of Counsel.

The foregoing Petition for Rehearing, in the judgment of all Counsel for Petitioners, and to which they herewith certify, is well founded with respect to the points of law, and that this Petition has been presented and filed in good faith and has not been interposed for the purpose of delay. Counsel for Petitioners further certify that they have sincerely followed the requirements of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, particularly Rule 58, and that the Petition is restricted to other substantial grounds available to Petitioners although not as pointedly presented previously, and, in certain respects, not previously presented at all.

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